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CASE NO.

in the Supreme Court of the United States

OCTOBER TERM, 1991

LUIS CARLOS QUINTERO-CRUZ,
BERNARDO VASQUEZ,
and MIGUEL VELEZ

Petitioners,

vs.

THE STATE OF LOUISIANA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL OF LOUISIANA, THIRD CIRCUIT

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QUESTIONS PRESENTED

1. Following the timely objection by a party to the proceedings, does an African-American prospective petit juror meet the non-onerus initial burden of proving racial discrimination in the exercise of a peremptory challenge, when the record lacks any neutral explanation for the exercise of a peremptory challenge against that minority prospective petit juror?

2. Under *Batson v. Kentucky*, 476 U.S. 79 (1986) and its progeny, can an appellate court affirm the refusal of the trial court to require a neutral explanation from a prosecutor, where the record does not show a neutral non-racial explanation for the exercise of a peremptory challenge?

3. Should all courts employ "a question of law" as the proper standard of review for the issue of whether a party has established in the trial court a prima facie case of racial discrimination in the exercise of a peremptory challenge against a prospective petit juror?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
INDEX TO APPENDIX	iii
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	2
BASIS FOR JURISDICTION	2
CONSTITUTIONAL PROVISION INVOLVED	2
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE PETITION	7
CONCLUSION	11
APPENDIX	App. 1-100

INDEX TO APPENDIX

	Page
Opinion of the Court of Appeal of Louisiana, Third Circuit	App. 1
Order of Louisiana Supreme Court denying review to Petitioner Quintero-Cruz	App. 53
Order of Louisiana Supreme Court denying review to Petitioner Vasquez	App. 54
Order of Louisiana Supreme Court denying review to Petitioner Velez	App. 55
Transcript of voir dire of prospective African-American petit juror Charles	App. 56
Transcript of voir dire of prospective African-American petit juror Cormier	App. 74

TABLE OF AUTHORITIES

Cases	Page(s)
Batson v. Kentucky, 476 U.S. 79 (1986)	7
Edmonson v. Leesville Concrete Co., Inc., 111 S.Ct. 2077 (1991)	8
Furnco Construction Corp. v. Waters, 438 U.S. 567 (1978)	9
Georgia v. McCollum, ____ U.S. ____ (U.S. case number 91-372)	8
Hernandez v. New York, 111 S.Ct. 1859 (1991)	8
Powers v. Ohio, 499 U.S. ____, 111 S.Ct. 1364 (1991)	8
Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981)	10
Trevino v. Texas, ____ U.S. ____ (U.S. case number 91-6751)	8

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PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL OF LOUISIANA, THIRD CIRCUIT

The Petitioners, Luis Carlos Quintero-Cruz, Bernardo Vasquez, and Miguel Velez, jointly petition this Court to review the judgment and opinion of the Court of Appeal of Louisiana, Third Circuit in this case.

OPINIONS BELOW

The decision of the Court of Appeal of Louisiana, Third Circuit is reported at 588 So.2d 116. The three decisions of the Supreme Court of Louisiana, which denied discretionary review to each of the three Petitioners, are reported at 592 So.2d 408.

BASIS FOR JURISDICTION

The final judgment of the Court of Appeal of Louisiana, Third Circuit was entered on October 2, 1991. The decision of the Supreme Court of Louisiana to deny review to all three Petitioners was made by order dated January 31, 1992.

This Court has jurisdiction to review the state appellate court decision pursuant to 28 United States Code Section 1257.

CONSTITUTIONAL PROVISION INVOLVED

The Fourteenth Amendment to the Constitution of the United States provides:

> ; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

The Petitioners, three Hispanics, were tried together for the crime of murder. During the jury selection process, the defendants repeatedly objected to the prosecution's use of peremptory challenges to strike African-American prospective petit jurors from service on their jury.

Under Louisiana's then-existing criminal procedure, La. C.Cr.P. art 788, a prospective petit juror was immediately sworn as a petit juror, if neither the State nor the defense exercised a peremptory challenge against him or her. Restated, Louisiana followed a use-it-or-lose-it procedure for peremptory challenges.[1] Because of this fact, Louisiana procedure easily exposed a pattern in the prosecution's strikes. By the prosecution's own calculations, fifteen of the State's thirty-six peremptory challenges were exercised against black jurors. After repeated defense objections, one black juror was selected as the eleventh of the twelve jurors.

The defendants asserted that they could raise a challenge pursuant to this Court's decision in *Batson v. Kentucky*, 476 U.S. 79 (1986) and the statute, La. C.Cr.P. art 795B, which was enacted to enforce it. Commendably, the trial judge was sensitive to this matter, but evidenced concern that a *Batson* challenge could not be raised by a defendant, who was not, himself, black. Ultimately, the trial judge ruled in accordance with the State of Louisiana's legal position that the three Hispanic defendants lacked standing to object to the exclusion of the African-American jurors by the prosecution.

During the entire jury selection process, the State never offered to provide even one neutral explanation for peremptorily challenging the African-American prospective jurors. Rather, the prosecution took a hard line that the absence of standing was decisive of the defendants' *Batson* claim.

On direct appeal, the three Petitioners[2] took the simple position that the precise issue before the Louisiana appellate

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[1]Other jurisdictions permit the procedure of backstriking of prospective jurors, before the jury is sworn in as a single unit.

[2]Petitioner Quintero-Cruz argued this issue in his brief. Petitioners Vasquez and Velez adopted Petitioner Quintero-Cruz's argument in their respective briefs.

court was then pending before this Court in a case styled *Powers v. Ohio* and that this Court's resolution of that case would be decisive of this issue.

In a reply brief, Petitioners honed in on the showing in the record that a prima facie case of discrimination was made before the trial court, assuming that the Petitioners' had standing. The Petitioners specifically referred to the transcript of the voir dire of two black prospective jurors, Mrs. Charles and Mr. Cormier, both of whom the State peremptorily challenged. The transcript of the voir dire of both of these two prospective petit jurors is included in the appendix to this petition for this Court's own perusal. (App. 56-100).

The questioning of those two jurors was very brief. Those two jurors were asked the same basic questions by the State that were asked of all of the jurors that were selected to serve on the jury. There is not one neutral reason apparent of record to explain why the State peremptorily challenged prospective jurors Cormier or Charles. Not one answer showed a bias against either the State or the defense. Moreover, no answer from these two prospective jurors can distinguish either of them from any of the answers received from any of the twelve jurors, who were selected to serve on the jury. Indeed, the defense exposed what the prosecution was doing by waiving any defense questioning of black prospective juror Charles, following which the State peremptorily challenged Mrs. Charles. (App. 72-73). Of similar import is the fact that the State announced a peremptory challenge of prospective juror Cormier almost immediately after the first defense attorney began his voir dire questioning of Mr. Cormier. (App. 97-100).

The Petitioners maintained that the transcript of the exclusion of prospective jurors Cormier and Charles, itself, was enough to raise the needed inference that at least these

two African-Americans were excluded from jury service because of discrimination against blacks. As a consequence, Petitioners maintained that they were entitled to a limited remand for a hearing on whether the prosecution intentionally discriminated against African-Americans during jury selection—at which time the prosecution would be required to present neutral reasons for the peremptory challenges of the various black jurors.

Prior to a decision in this case by the Louisiana appellate court, this Court decided *Powers v. Ohio*, 499 U.S. ____, 111 S.Ct. 1364 (1991). *Powers* vindicated the precise position, which Petitioners had asserted before the trial court.

In this case, the lower Louisiana appellate court recognized the binding nature of the *Powers* decision on this direct criminal appeal. Nevertheless, the lower Louisiana appellate court refused to reverse and remand for a hearing. Instead, that appellate court decided to review the cold record in the first instance and made the initial determination that nothing in the transcripts of the jury voir dire established a prima facie case of discriminatory intent in the selection of the jury.[3] (App. 11-18).

Simply stated, the lower appellate court made the determination that the appellate record *conclusively* established the absence of a prima facie case of racial discrimination by the prosecution in the selection of the jury that tried this case. The reasoning of the lower appellate court is a jumble of numbers and statements, which are

[3]Because the Louisiana appellate court was the first court to decide whether the Petitioners met their initial burden of establishing a prima facie case of discrimination, the only basis for that court's determination was the cold transcript. Consequently, this Court is in the same position as that court in its ability to assess whether the appellate record contains enough to call for a remand to the trial court.

entirely lacking in a basic legal theoretical approach to how to determine whether a prima facie case of discrimination is established. That court summarized its omnibus evaluation, "What we detect from the voir dire transcript is the prosecutor's preoccupation with seating jurors open to, and comfortable with, the death penalty, a characteristic she would have understandably desired for all jury members." (App. 16).

The Petitioners sought review of this intermediate appellate court decision in the Supreme Court of Louisiana. In the pleading, which was filed in that court[4], the Petitioners asserted that the lower appellate court erred in its determination that no prima facie case had been established. Petitioners asserted that the lower appellate court's ultimate conclusion was debunked by the voir dire transcripts of Mrs. Charles and Mr. Cormier. Nothing stated by the lower appellate court neutralized the total absence of a rational explanation for the State's exercise of its peremptory challenge of those two jurors.

Petitioners also asserted that it was necessary to clarify and enforce the legal distinction between establishment of a prima facie inference of discrimination, which triggers a further hearing, and the ultimate resolution of the issue of whether a prosecutor did in fact discriminate. Specifically, Petitioners asserted:

> *** If the totality of the facts relevant to raising an inference of discrimination permit that inference, a defendant has met his initial burden. It is a bedrock of criminal and civil law in every jurisdiction in this Country, that an evaluation of whether a claim is

[4]Petitioner Quintero-Cruz made the argument in his Application for a Writ of Certiorari. Petitioners Vasquez and Velez adopted that argument in their respective applications, which were filed in the Supreme Court of Louisiana.

prima facie established requires a court, as a matter of law, to make all inferences from established facts *in favor of* that claim.

At this first stage, it is legal error for a court to weigh the favorable against the unfavorable. That latter weighing is done at the second stage—when the court makes credibility choices and determines whether there was discrimination in the exercise of the challenges. All that is required is a showing of a *likelihood* that the claim is well-taken. A trial judge has no discretion to grant a directed verdict, if a prima facie case of discrimination is inferable.

In this case, the lower appellate court looked for facts unfavorable to Relator's claim, rather than conceding the existence of many facts that supported an inference of discrimination. In actuality, the lower appellate court did not decide whether a prima facie case was established; but rather determined the ultimate issue that there was no discrimination in fact—an issue involving credibility choices reserved by law to the trial judge, not an appellate court for the first time on appeal. *Hernandez v. New York*, ____ U.S. ____, 111 S.Ct. 1859, 1868–1872 (1991). Consequently, the legal analysis, which was employed below, was legally erroneous.

The Supreme Court of Louisiana denied further review, in three simple orders lacking any explanation. (App. 53-55).

REASONS FOR GRANTING THE WRIT

Over the past six years since its initial decision in *Batson v. Kentucky*, 476 U.S. 79 (1986), this Court has established and expanded on the Equal Protection Clause

right of minority prospective petit jurors to participate in the judicial process at the trial court level. *Powers v. Ohio*, 499 U.S. ____, 111 S.Ct. 1364 (1991); *Edmonson v. Leesville Concrete Co., Inc.*, ____ U.S. ____, 111 S.Ct. 2077 (1991); *Trevino v. Texas*, ____ U.S. ____ (U.S. case number 91-6751; opinion filed April 6, 1992; Hispanic defendant raising exclusion of black members of venire from jury service in his capital murder case).[5]

Just last year in *Hernandez v. New York*, ____ U.S. ____, 111 S.Ct. 1859 (1991), this Court established the legal standards that control review of a trial court's *final* determination that a prosecutor's explanation for the exercise of a peremptory challenge of a minority prospective petit juror is race neutral. In the context of a criminal case, this Court applied the same standards of review that this Court had already established in its civil decisions on discrimination.

Reliance on this line of civil cases was foreshadowed in the original *Batson* opinion. However, *Batson* never explicitly clarified the standards for review of the *initial* determination of whether a prima facie case of discrimination was established by the defense.[6]

The *Batson* decision left all of the lower federal and state courts to grapple with how to determine whether a trial court erred in its determination that a prima facie showing of discrimination had *not* been made. In criminal cases, no uniform standard has emerged. This Court should do for the

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[5]As of the preparation of this petition, this Court has not yet determined whether the rationale of *Batson* applies to limit a criminal defendant's use of peremptory challenges. That issue is pending in *Georgia v. McCollum*, ____ U.S. ____ (U.S. case number 91-372).

[6]In light of the *Edmonson* decision, any party to a civil case can now establish a prima facie showing of discrimination in jury selection.

initial stage of this litigation what it did in *Hernandez* to set a uniform standard for review of the *final* determination.

Furnco Construction Corp. v. Waters, 438 U.S. 567 (1978) granted certiorari to determine what then-Justice Rehnquist determined to be an *important* question of the scope of a prima facie showing in a discrimination case. *Furnco* established that the standard for review of whether a prima facie case of discrimination was made out was "a matter of law." *Id.* 438 U.S. at 575. *Furnco* explained with simple clarity the concept of what little must be shown to establish a prima facie case of discrimination.

> [The moving party] carries the initial burden of showing actions taken by [the other party] from which one can infer, if such actions remain unexplained, that it is more likely than not that such actions were 'based on a discriminatory criterion . . . .'
>
> *Id.* 438 U.S. at 576.

Furnco held that a reviewing court commits legal error in equating a prima facie showing of discrimination with an ultimate finding of fact as to discrimination, because the two "are quite different and that difference has a direct bearing on the proper resolution of th[e] case." *Id.* 438 U.S. at 576.

In his normal clarity, now-Chief Justice Rehnquist stated:

> *** A prima facie case . . . raises an inference of discrimination only because we presume these acts, if otherwise unexplained, are more likely than not based on the considerations of impermissible factors. [citation omitted]. And we are willing to presume this largely because we know from our

> experience that more often than not people do not act in a totally arbitrary manner, without any underlying reasons, especially in a business setting. Thus, when all legitimate reasons for rejecting an applicant have been eliminated as possible reasons for the employer's actions, it is more likely than not the employer, who we generaly assume acts only with *some* reason, based his decision on an impermissible consideration such as race.

Id. 438 U.S. at 577.

This Court subsequently held that the initial burden of establishing a prima facie case of discrimination "is not onerous." *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981).

This Court should adopt the standards contained in its decision in *Furnco* to review of a trial court's initial determination of whether a party in either a civil or a criminal case has met its initial burden of establishing a prima facie case of discrimination in the selection of a jury.

Legal error clearly appears, when one applies *Furnco* to this record and to the lower Louisiana appellate court's decision. *Furnco* provides the uniformity now lacking in review of a trial court's finding that a litigant has *not* made a prima facie case of discrimination before the trial court.

Under the present state of the law, the right to a race-neutral explanation, which has been established in *Batson* and its progeny, is **illusory.**

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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Appendix

INDEX TO APPENDIX

	Page
Opinion of the Court of Appeal of Louisiana, Third Circuit	App. 1
Order of Louisiana Supreme Court denying review to Petitioner Quintero-Cruz	App. 53
Order of Louisiana Supreme Court denying review to Petitioner Vasquez	App. 54
Order of Louisiana Supreme Court denying review to Petitioner Velez	App. 55
Transcript of voir dire of prospective African-American petit juror Charles	App. 56
Transcript of voir dire of prospective African-American petit juror Cormier	App. 74

[FILED OCT 2 1991]

COURT OF APPEAL, THIRD CIRCUIT
STATE OF LOUISIANA

NO. CR90-230

STATE OF LOUISIANA

VERSUS

MIGUEL VELEZ, BERNARDO VASQUEZ,
and LUIS CARLOS QUINTERO-CRUZ

Appeal from the Fourteenth Judicial District Court,
Parish of Calcasieu, State of Louisiana;
Hon. Charley Quienalty, District Judge, Presiding.

Before DOMENGEAUX, C.J., and STOKER and LABORDE, JJ.

DOMENGEAUX, Chief Judge.

Defendants, Miguel Velez, Bernardo Antonio Vasquez, and Luis Carlos Quintero-Cruz, were charged by an East Baton Rouge Parish grand jury indictment with the first degree murder of Adler B. Seal, a violation of La. R.S. 14:30. Due to extensive pretrial publicity in Baton Rouge, a motion by defendants for change of venue was granted and the matter was transferred to the Fourteenth Judicial District Court in Calcasieu Parish. After a five week trial, the twelve person jury unanimously found each of the defendants guilty of first degree murder. At the penalty phase of the trial, the jury recommended that each of the defendants be sentenced to life imprisonment without benefit of parole, probation or suspension of sentence. The trial court imposed sentence in accordance with the jury's determination. Defendants now appeal their convictions to this court. We will consider all

assignments of error that have been briefed. Those which have not been briefed are considered abandoned. Uniform Rules, Courts of Appeal, Rule 2-12.4.

FACTS

On February 19, 1986, Adler B. "Barry" Seal was shot to death with machine gun fire in the parking lot of a Salvation Army halfway house in Baton Rouge. The facts and circumstances leading up to Seal's death appear in the record as follows:

Barry Seal was a pilot and drug smuggler for the Medellin Cartel, a Colombian cocaine enterprise. While employed by the Cartel, Seal flew numerous shipments of cocaine from Colombia to the United States, earning as much as $500,000 per flight. Seal, who was known to the members of the Medellin Cartel as McKenzie, was eventually arrested in connection with his drug smuggling activities. He was indicted in a Florida federal court, tried, convicted, and sentenced to 10 years in a federal prison.

Shortly after Seal was sentenced, he approached the Drug Enforcement Administration with a proposal to cooperate with the government as an informant. The federal government eventually decided to use Seal as an informant, agreeing to advise the sentencing judge of his cooperation at hearings on any motions for reduction of sentence. Pursuant to this agreement, Seal began working as a federal informant in March of 1984.

Richard Gregory, United States Attorney for the Southern District of Florida, testified that Barry Seal was vitally important to the prosecution of drug traffickers, to the extent that many convictions could not have been obtained without his testimony. As a result of Seal's cooperation, indictments were brought against Pablo

Escobar and Jorge Ochoa, two of the top men in the Medellin Cartel. Shortly after these indictments were returned in July of 1984, Jorge Ochoa was arrested in Spain. Extradition procedures were begun, and Seal provided the supporting affidavits which were filed in the Spanish courts.

In November of 1984, a documentary entitled "Uncle Sam Wants You" was produced and aired by WBRZ-TV in Baton Rouge. The documentary was prepared by investigative reporter John Camp and outlined Seal's experiences as a drug smuggler and federal informant.

Max Mermelstein, a former drug trafficker and member of the Medellin Cartel, testified that in December of 1984, he attended a meeting at the Miami home of Raphael Cardona-Salazar, another member of the Medellin Cartel. Also present at Cardona-Salazar's residence were the defendant, Miguel Velez (who is sometimes referred to in the record as "Cumbamba," the Spanish word for "chin"), an employee of Fabio Ochoa's named Cano, and several others. Fabio Ochoa had taken over the leadership of the Cartel after Jorge Ochoa was arrested in Spain. Away from the others, Mermelstein, Cardona-Salazar, and Cano watched a video of "Uncle Sam Wants You", and Mermelstein was instructed that he had been selected to take care of Barry Seal. Seal was to be kidnapped and returned to Colombia or killed outright. Either at this meeting or at a second meeting, Fabio Ochoa and Pablo Escobar were contacted by telephone, authorized the contract, and personally thanked Mermelstein for agreeing to take it on.

The price for kidnapping Seal was $1,000,000, while the price for murdering him was $500,000. Mermelstein was chosen to carry out the contract because he was American and would not be noticed in Baton Rouge the way Colombians would. He testified that he accepted the contract out of fear for the safety of himself and his family.

Mermelstein was given expense money and a variety of information on Seal's residence, vehicles, restaurants which he frequented, and other personal matters. Pursuant to the contract, Mermelstein made three trips to Louisiana and was unable to locate Seal. He enlisted the help of two men, John Roberts and Bob Dragan, during his trips to Louisiana but was unsuccessful in carrying out the contract.

Mermelstein further testified that another meeting was held in February of 1985, during which discussions were had concerning the contract on Seal. Defendant Velez was present at this meeting. Cardona-Salazar said that he was being pressured by Pablo Escobar and the Ochoas to have Seal eliminated as soon as possible. At the conclusion of this meeting, Velez expressed privately to Mermelstein his displeasure at not being included in the contract on Seal. He inquired as to the details of the contract and expressed interest in obtaining the contract for himself. Velez then stated that he would complete the contract even if it meant taking out Seal's wife and children in the process. Mermelstein advised Velez he had no authority to include him and that the only persons who could do so were Fabio Ochoa, Pablo Escobar, or Raphael Cardona-Salazar. Velez stated that he intended to approach them about being included in the contract, but Mermelstein did not state whether Velez had carried out his intention or if Velez had been given the necessary permission to take over the contract.

Mermelstein noted that Velez was the last person he saw in physical possession of the Mac-10 machine gun which Cardona-Salazar had previously test fired in Mermelstein's home, and which was later used to kill Seal.[1] Before

[1]Ballistics comparisons between slugs removed from the closet area of Mermelstein's home and those removed from Seal's Cadillac proved conclusively that they were fired from the same Mac-10 machine gun which was recovered from the getaway vehicle on the day of the killing.

Mermelstein was able to carry out the murder contract on Barry Seal's life, he was arrested for drug smuggling activities and became a government informant protected by the federal government's witness protection program.

Another government witness, Luis Carlos Uribe-Munera, associated with the Medellin Cartel for a number of years, testified that he was asked by a representative of the Ochoa family to go to the United States and kill someone. He did not know the proposed victim's name, but was told that he was the only person who could damage Jorge Ochoa after he was arrested in Spain. Uribe-Munera and another Colombian accepted the contract to kill this witness but later backed out. Shortly thereafter, Uribe-Munera's cohort was murdered and Uribe-Munera himself was shot five times. On cross-examination, Uribe-Munera admitted that he was a revolutionary terrorist and was addicted to crack cocaine or cocaine paste from 1969 until his arrest in 1986. He is currently serving time in a United States federal prison where he takes medication for numerous health problems.

Meanwhile, because of Barry Seal's cooperation with the federal government, his 10-year sentence in Florida was reduced to time served. Pursuant to his agreement with the federal government, Seal pleaded guilty to drug charges in a Louisiana federal court. Lewis Unglesby, Seal's attorney from 1984 until his death, testified that it was his understanding that the agreement provided that Seal could receive no harsher sentence in Louisiana than what the federal court in Florida had imposed.

At Seal's Louisiana sentencing, United States District Judge Polozola recognized Seal's agreement with the government but sentenced Seal to a term of probation, with the condition that he reside in a Baton Rouge Salvation Army halfway house for six months. Seal was required to

report to the halfway house at 6:00 p.m. each day, spend the night, and leave the following morning at 7:00 a.m. On January 24, 1986, Barry Seal reported to the halfway house to begin serving his sentence. As feared by Seal's attorney, Seal was murdered three weeks later on February 19, 1986.

The evidence adduced at trial reveals the following activities of the defendants and certain unindicted and indicted coconspirators in the days surrounding the murder of Barry Seal. Airline, hotel, and car rental records indicate that on February 12, 1986, defendant Bernardo Antonio Vasquez took an Eastern Airlines flight from Miami to New Orleans and checked into the New Orleans Airport Hilton. He then rented an Oldsmobile from Avis for a period of seven days. Four days later, on February 16, 1986, defendant Miguel Velez arrived in New Orleans on an Eastern Airlines flight from Miami. Traveling with Velez were Heriberto Sanchez Cardenas and John Jairo Cardona Garcia. Upon arrival, Velez checked into the same Airport Hilton where Vasquez had registered four days earlier. That same day, Vasquez rented another vehicle, a Lincoln Town Car, this time from Budget Car Rental. Meanwhile, defendant Luis Carlos Quintero-Cruz had entered the United States illegally through Mexico. This was revealed by an immigration official who interviewed Cruz subsequent to his arrest.

Shortly after midnight, on February 17, 1986, Vasquez arrived at the Holiday Inn South in Baton Rouge. He was driving a Lincoln Town Car. Vasquez and a companion checked into the hotel and checked out several hours later prior to 8:00 a.m.

Between 2:00 a.m. and 3:00 a.m., also on February 17, Vasquez and his companion checked into the Jay Motel in Baton Rouge, located next to the Salvation Army halfway house where Barry Seal was serving his probation sentence. Photographs were introduced at trial which showed that

Vasquez's room at the Jay Motel had a direct view of the Salvation Army parking lot where Barry Seal arrived and departed daily.

Vasquez returned to New Orleans later in the day, on February 17, and purchased a Buick Park Avenue automobile from Herman Cardenas at Toyota of Jefferson. He paid $6,500.00 cash for the car and purchased it in the name of his girlfriend, Mary Cook. Peter Ashooh, an FBI agent, ran checks on all of the information which Vasquez provided on Mary Cook, e.g., driver's license, social security number, address, and determined that none of the information was connected to anyone named Mary Cook.

Vasquez picked up the Buick from Toyota of Jefferson on the following day, accompanied by a heavy set, dark complexioned Hispanic male. Vasquez left in the rented Lincoln which he drove to the dealership while the Hispanic male took the Buick. The description of the person who was with Vasquez that day matches that of Jose Renteria Campo, who had checked into the New Orleans Airport Hilton earlier on February 18.[2]

On February 18 and 19, Vasquez went to Anthony's Department Store in Kenner, Louisiana, and purchased a rain slicker, baseball caps, and luggage. He later returned and bought more clothing, including a plaid western shirt. Two walkie-talkie radios were purchased for $341.00 cash at Radio Shack in Esplanade Mall in Kenner. The radios were purchased under the name Jose Lopez. One was found inside

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[2]The evidence suggested that Campo may have brought the Mac-10 machine gun which was used to kill Seal and the Uzi pistol found in the getaway vehicle from Miami to New Orleans. Campo borrowed an Uzi from Jose Countin, a firearms dealer in Miami, after inquiring about the purchase of several weapons. Campo never returned the Uzi which Countin had loaned him. Countin identified the Uzi found in the getaway vehicle as the same one which he had loaned to Campo. Countin also identified defendant Velez as having accompanied Campo to his store.

the getaway vehicle on the day of the murder. The fingerprints of Bernardo Vasquez were found on the batteries inside this radio.

Dennis Debate, an East Baton Rouge Parish sheriff's deputy, testified that on February 19, at approximately 5:45 p.m., he observed a late model Buick parked in the middle of the road adjacent to the Belmont Hotel, near the Salvation Army halfway house. An individual sat in the car wearing a red or orange baseball cap and a T-shirt, smoking a cigarette.

Shortly thereafter, at approximately 6:00 p.m., Barry Seal arrived at the Salvation Army. He backed his white Cadillac into a parking space and opened the driver's door. Before he could get out of his vehicle, however, a gunman jumped from behind the donation drop boxes and fired a .45 caliber Mac-10 machine gun. Seal died of multiple gunshot wounds to the head. The gunman ran to a waiting Buick which sped away from the Salvation Army.

Several eyewitnesses to the murder testified at trial. Robert Lane observed a vehicle with two men pull into a parking space near the drop boxes at the Salvation Army. Both men got out of the car and put items into the drop boxes, including a plaid article of clothing. (A new plaid shirt with straight pins still in it was recovered from one of the drops boxes at the Salvation Army.) Lane stated that the driver was taller than the passenger and wore scrub pants. The passenger was the gunman and was a shorter individual. Lane identified the vehicle which left the Salvation Army as a Buick Park Avenue. Lane also identified defendant Velez as the person who drove the getaway vehicle. Witnesses Colleen McGehee, Mitchel Orgeron, and Benny Louis identified defendant Luis Carlos Quintero-Cruz as the gunman. Witness Alvin Ricks stated that one of the individuals had a "Dick Tracy" chin. It was brought out at

trial that Velez was nicknamed "Cumbamba" because of his protruding chin.

After the shooting, the men in the Buick raced from the parking lot and drove approximately three-tenths of a mile down the service road. They abandoned the Buick with the engine still running, got into a red Cadillac, and left the scene. The Mac-10 machine gun, along with an Uzi pistol, various quantities of ammunition, clothing from Anthony's Department Store, and a walkie-talkie radio with the power running, and other items, were recovered from the Buick. East Baton Rouge sheriff's deputies Hardy and Bonnette observed the switch from the Buick to the Cadillac. Both deputies testified that the men changed vehicles in great haste. Hardy testified the driver was taller than the passenger. Bonnette testified that the passenger looked like defendant Cruz, but could make no positive identification.

Fingerprints from the three defendants were found in both the Buick and the red Cadillac, which was recovered sometime later at the New Orleans Airport Parking Garage. The Cadillac had 162 miles elapsed from the time of rental. Evidence was introduced at trial to show this was the approximate mileage of a round trip between Baton Rouge and New Orleans.

Approximately one and one-half hours after the shooting, Jose Renteria Campo and Vasquez checked out of the New Orleans Airport Hilton. Velez attempted to get a flight out of New Orleans but was unable to do so. He was detained briefly at the airport by FBI agents, but released due to incomplete descriptions of the murder suspects. Velez then met Vasquez at the Hilton. Velez never checked out of the hotel, but rather, hired a taxicab to take him to Montgomery, Alabama. He paid a fare of $235.00 in cash. While en route to Alabama, Velez's taxi hit a deer near Meridian, Mississippi. He was arrested shortly thereafter,

with the keys to the red Cadillac in his possession, along with cash and luggage containing scrub pants.

Meanwhile, Vasquez discussed with several witnesses the fact that he wanted to transport three illegal aliens from Colombia who had entered the country through Mexico. He told Gonzalo Jaramillo that one of them had already been stopped by immigration officials, and he pointed to an article concerning the Seal murder in the February 21, 1986 Times Picayune.

Vasquez was arrested at Gonzalo Jaramillo's residence on February 21. Prior to this he had been placed under surveillance by the FBI, based on a tip by Jaramillo. Agents observed Vasquez abandon the Lincoln Town Car in the parking lot of a New Orleans business called Gator Graphics. He was also observed placing a number of objects into a trash bin. Found in the trash bin by the FBI agents were the keys to the rented Lincoln, a pair of black knit gloves, a map from Avis Car Rental, a rental agreement in the name of Bernardo Vasquez which had been torn in half, and a baseball cap. After abandoning these items, Vasquez took a taxi to the general area of Jaramillo's home and walked to the residence. He left a short time later and went to a residence on Glasco Street where Cruz and Cardona Garcia had previously gone. He returned to Jaramillo's home where he was arrested a short time later.

Alberto Villada-Zapata testified that he picked up defendant Cruz and Cardona Garcia at Vasquez's request and transported them to 5825 Glasco Street. Cruz was later arrested at this residence in possession of over $3,000 cash, plus Mexican and British currency. Garcia was also arrested and found to be in possession of $2,000 cash.

All three defendants were found guilty of first degree murder based on the aforementioned testimony and evidence. They now appeal their convictions to this court.

Issue #1

BATSON CHALLENGE

By this assignment of error, defendants contend the trial judge improperly permitted race based exclusions of jurors effected through peremptory challenges, even though the defendants and the excluded jurors did not share the same race.

Defendants are members of the Hispanic race. Throughout the jury selection process, defendants objected when the prosecutor exercised peremptory challenges to remove black venirepersons. Defendants urged their objections pursuant to the United States Supreme Court decision in *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986) and La. C.Cr.P. art. 795 which prohibit the exercise of a peremptory challenge based solely on race.

The trial judge overruled the objections based on the *Batson* requirement that the defendant be a member of the same cognizable racial group as the excused juror. At the time of trial, there was sparse, if any, jurisprudence interpreting Article 795, and the trial judge declined to construe the article as any more broad than the *Batson* decision. Essentially, the trial court held the defendants did not have standing to object to the State's peremptory challenges of certain black venirepersons. Therefore, the trial judge did not determine whether defendants had made a prima facie showing of purposeful discrimination, and the State was not required to present neutral explanations for the disputed challenges.

Since the trial of this matter, the United States Supreme Court has expanded *Batson* to allow a criminal defendant to object to race based exclusions of jurors effected through peremptory challenges even if the defendant and the excluded juror do not share the same race. *Powers v. Ohio*, ___ U.S. ___, 111 S.Ct. 1364, ___ L.Ed.2d ___ (1991). (*Batson* has likewise been extended to civil litigants. See *Edmonson v Leesville Concrete Co., Inc.*, ___ U.S. ___, 111 S.Ct. 2077, ___ L.Ed.2d ___ (1991.))

Because *Batson* itself was applied retroactively as a constitutional rule of criminal procedure, see *Griffith v. Kentucky*, 479 U.S. 314, 107 S.Ct. 708, 93 L.Ed.2d 649 (1987), any extension of *Batson* must likewise be given retroactive effect. See also *State v. Thompson*, 516 So.2d 349 (La. 1987), cert. denied, 488 U.S. 871, 109 S.Ct. 180, 102 L.Ed.2d 149 (1988). Therefore, we must consider the facts of this case in light of the *Powers* decision.

The *Powers* case involved a white defendant who objected to the exclusion of black jurors. The court considered the specific question of whether such a defendant has standing to raise the equal protection rights of a juror improperly excluded from service. The court focused on the juror as the aggrieved party and discussed the criteria which must be evident before a litigant (in this case the criminal defendant), will be allowed to assert the rights of a third party (here, the juror):

> [T]he litigant must have suffered an "injury-in-fact," thus giving him or her a "sufficiently concrete interest" in the outcome of the issue in dispute, *Singleton* [*v. Wulff*, 428 U.S. 106, 112, 96 S.Ct. 2868, 2873, 49 L.Ed.2d 826 (1976)]; the litigant must have a close relation to the third party, id., at 113-114, 96 S.Ct., at 2873-2874; and there must

> exist some hindrance to the third party's ability to protect his or her own interests. Id., at 115-116, 96 S.Ct., at 2874-2875. See also *Craiq v. Boren*, 429 U.S. 190, 97 S.Ct. 451, 50 L.Ed.2d 397 (1976).

111 S.Ct. at 1370-1371.

The *Powers* court determined that the discriminatory use of peremptory challenges causes a criminal defendant cognizable injury because such a practice jeopardizes the integrity and fairness of the judicial process. The defendant and the prospective juror have a close relation for purposes of the trial because the defendant seeks to establish a bond of trust with the juror from the initiation of voir dire through the sentencing phase of the trial. Finally, the *Powers* court noted that an excluded juror has little incentive to bring an action on his own behalf, and because of the defendant's similar interest in eliminating racial discrimination from the courtroom, the defendant would be a proper party to assert the juror's rights.

Because the *Powers* prosecutor had previously agreed to a remand in the event the standing issue would be resolved in the defendant's favor, the Supreme Court, through Justice Kennedy, made only the following brief comments on the question of what constitutes a prima facie showing of purposeful discrimination:

> The emphasis in *Batson* on racial identity between the defendant and the excused prospective juror is not inconsistent with our holding today that race is irrelevant to a defendant's standing to object to the discriminatory use of peremptory challenges. Racial identity between the defendant and the excused person might in some cases be the explanation for the prosecution's adoption of the forbidden stereotype, and if the alleged race bias

> takes this form, it may provide one of the easier cases to establish both a prima facie case and a conclusive showing that wrongful discrimination has occurred. But to say that the race of the defendant may be relevant to discerning bias in some cases does not mean that it will be a factor in others, for race prejudice stems from various causes and may manifest itself in different forms.
>
> It remains for the trial courts to develop rules, without unnecessary disruption of the jury selection process, to permit legitimate and well-founded objections to the use of peremptory challenges as a mask for race prejudice.

111 S.Ct. at 1373-1374.

According to this language, the existence of a racial identity between the defendant and the excluded juror is irrelevant to the defendant's standing to object to a peremptory challenge based on race. Rather, it is only one factor to be considered in determining whether the defendant has made a prima facie showing of discrimination. The *Batson* requirement that other relevant circumstances must be considered is still viable, and racial identity is only one of those circumstances. The defendant must always make a prima facie showing of discrimination before the prosecutor will be required to present neutral explanations for his peremptory challenges.

In the case before us, the trial judge overruled defendants' objections to some of the prosecutor's peremptory challenges on the basis that the defendants did not have standing to so object. Had the trial judge not based his decision on standing, but rather on the lack of a prima facie showing of discrimination, we hold, based on our review of the voir dire transcript, that the result would have been

the same. We find, therefore, that the trial judge properly overruled the defendants' objections, not because of a lack of standing, but because of the absence of a prima facie showing of discrimination.

The record before us reveals the following circumstances. Over 300 venirepersons were interviewed during voir dire. The prosecutor was given 36 peremptory challenges and exercised 21 challenges on whites and 15 challenges on blacks.[3] The prosecutor asked similar questions of black and white prospective jurors and spent generally as much time questioning blacks as whites. Approximately eight blacks were excused because of reservations concerning the death penalty, just as numerous whites were excused for the same reason. One black female was seated on the jury and the prosecutor accepted a black who was excluded by defense counsel, both of which occurred before the State exhausted its peremptory challenges.

The defendants had no racial identity with the challenged jurors, although it is true they were all members of minority groups. The defendants were charged with first degree murder which requires a unanimous verdict, discounting an inference that the prosecutor may have allowed a minimum number of blacks on the jury because their votes may not ultimately count, such as in a noncapital case which requires the concurrence of only ten jurors for a

[3]Our review of the record reveals the following black venirepersons whose race was noted in the record and who were challenged by the State, over defense objections: Rious, Simmons, Broussard, Griffin, Pierfax, Charles, Dugas, Batchan, Antoine, Hawkins, Cormier, Fontenot, and Dellafosse. Jurors Edwards and Bellard were challenged without objection, and we can only surmise that they are black because of an oral listing given by the trial judge during the course of voir dire.

guilty verdict.[4] Finally, we note the record reflects no pattern of strikes against blacks and no systematic exclusion of blacks from this jury. What we detect from the voir dire transcript is the prosecutor's preoccupation with seating jurors open to, and comfortable with, the death penalty, a characteristic she would have understandably desired for all jury members.

Our holding today is consistent with recent Louisiana jurisprudence interpreting *Batson* and its progeny. In *State v. Thompson*, supra, the Supreme Court applied *Batson* retroactively, reviewed the circumstances of voir dire, and concluded the defendant failed to establish a prima facie case of purposeful discrimination. In spite of the fact that the prosecutor exercised all of his peremptory challenges against blacks, the final jury consisted of four blacks and the State accepted three others who were excused by the defense. These seven blacks were accepted by the State before the prosecutor had exhausted all of his challenges. Additionally, the court found nothing in the prosecutor's questions during voir dire which would support an inference of a discriminatory purpose. In *State v. Collier*, 553 So.2d 815 (La. 1989), the Supreme Court reversed and remanded for a new trial a case in which the prosecutor exercised eight peremptory challenges, and all challenged venirepersons were black, as was the defendant. The final jury composition was ten whites and two blacks, and the defendant was charged with a noncapital offense which requires the concurrence of only ten jurors. The trial court and the Supreme Court found these facts constituted a prima facie showing of discrimination; the trial judge was thereafter satisfied by the prosecutor's racially neutral explanation for each challenge, but the Supreme Court disagreed with that finding and remanded for a new trial.

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[4]This suggested inference is based on the unacceptable belief that all black jurors will vote on the basis of racial bias. See *State v. Collier*, 553 So.2d 815 (La. 1989).

In *State v. Potter*, 578 So.2d 528 (La. App. 4th Cir. 1991), the Fourth Circuit remanded for a *Batson* hearing after it determined that a prima facie showing of discrimination had been made because the prosecutor exercised 11 challenges, all against blacks, in the trial of a black criminal defendant. Conversely, in *State v. Cannon*, 572 So.2d 740 (La. App. 4th Cir. 1990), writ denied, 575 So.2d 821 (La. 1991), the court affirmed the trial court's denial of the defendant's *Batson* objection after noting the 50-person venire was comprised of 37 blacks. The court pointed out, "Because of the overwhelming number of blacks on the venire, most of those being challenged had to be black and possibly all those presented as prospective jurors were black." 572 So.2d at 742. The court held that no prima facie showing of purposeful discrimination was made in that case.

In *State v. Royal*, 527 So.2d 1083 (La. App. 1st Cir. 1988), writ denied, 533 So.2d 15 (La. 1988), the denial of defendant's *Batson* challenge was affirmed, and the court concluded that the State had legitimate reasons unrelated to race for excusing certain black potential jurors. Additionally, the court noted the relevant statistical circumstances: the defendant was black, three black jurors were seated, the first juror seated was black, and the prosecutor exercised five peremptory challenges to exclude white venirepersons. Similarly, in *State v. Simms*, 505 So.2d 981 (La. App. 3d Cir. 1987), this court affirmed the denial of a *Batson* challenge by a black defendant, and noted the defendant had not met his burden of showing purposeful discrimination since one of the three jurors selected at the time of his *Batson* objection was a member of the black race.

The facts presented in this case do not establish a prima facie case of purposeful discrimination. We conclude, as did the *Thompson* court, the State did not exercise its peremptory challenges with a discriminatory purpose. Neither the voir dire transcript nor the numerical evidence

concerning the prosecutor's challenges support such an inference; accordingly, the State was under no obligation to present racially neutral reasons for each peremptory challenge of a black venireperson. While it is true the trial judge incorrectly determined that defendants did not have standing to object under *Batson*, the trial judge ultimately did not err in denying defendants' motion for mistrial based on the State's exercise of its peremptory challenges against blacks because no prima facie showing of purposeful discrimination was made.

Issue #2

OTHER CRIMES EVIDENCE

Defendants next contend the trial judge erred in allowing into evidence certain testimony concerning the illegal activities of the Medellin Cartel and testimony regarding the defendants' illegal possession of firearms. Specifically, defendants argue that much of the testimony of Mermelstein and Uribe-Munera was irrelevant, prejudicial, and inflammatory and constituted grounds for a mistrial. The evidence did not pertain to any of the defendants, yet prejudiced them to the extent that Velez was implicated as a member of the Cartel, and Vasquez and Cruz were joined to Velez as codefendants in the same trial. The firearms evidence did allegedly pertain to the defendants, but, they contend, it constitutes inadmissible other crimes evidence.

At the outset, we can dispose of the issue concerning the firearms evidence with minimal discussion. According to La. C.E. art. 404B(1), evidence of other crimes, wrongs, or acts is admissible when "it relates to conduct that constitutes an integral part of the act or transaction that is the subject of the present proceeding." This is the codification of the res gestae provision formerly enacted at La. R.S. 15:447-448. Evidence admissible under the res gestae exception to the general inadmissibility of other crimes evidence is not

subject to any notice requirements. *State v. Prieur*, 277 So.2d 126 (La. 1973).

The testimony of Robert Barns from the Bureau of Alcohol, Tobacco, and Firearms revealed that the Mac-10 machine gun found in the getaway car was illegal because it contained no serial number and was not registered with the United States government. This gun was used in the murder of Barry Seal, and evidence of the defendants' possession of it is an integral part of the crime at issue herein. The Uzi identified by Jose Countin was likewise found in the getaway car and is therefore governed by the same rule.

The evidence relating to the Medellin Cartel and its various criminal activities is more problematic, but we find the trial judge did not err in failing to exclude it. The record shows that Mermelstein was associated with the Medellin Cartel and was responsible for the importation of 111,000 pounds of cocaine into the United States. The focus of Mermelstein's testimony was the formation of the initial contract to kill Barry Seal. However, in the course of explaining how the contract came to be, Mermelstein discussed the inner workings of the Cartel and the benefits of being a Cartel member; he also briefly outlined the cocaine exportation and distribution process and offered unsolicited testimony on crimes he had witnessed.

Uribe-Munera testified that he agreed to go to the United States and kill someone pursuant to a request by a Cartel representative. When he later backed out of the agreement, he was shot five times. This testimony was offered to show Uribe-Munera's involvement in the conspiracy to kill Barry Seal. However, in the course of explaining that involvement, Uribe-Munera testified to a virtual plethora of criminal activity associated with the Cartel. He described his participation in numerous murders in Colombia which included the killing of a judge, a doctor,

and a mayor, and he discussed his involvement with well-known Colombians such as Carlos Lehder and the Ochoa family. He spoke of drug smuggling, kidnapping, illegal weapons possession, and forged travel documents. The challenged testimony of Mermelstein and Uribe-Munera was not connected to any defendant.

The State contends that all of the challenged evidence was relevant to prove the offeror's motive in this murder-for-hire case. The Cartel, as the offeror, wanted Barry Seal silenced because he was privy to the criminal activities of the Cartel as described by Mermelstein and Uribe-Munera. The State also argued at trial that much of the challenged evidence was *Giglio* material, i.e., evidence relating to the credibility of prosecution witnesses, and should therefore be admissible. See *Giglio v. United States*, 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972).

The Louisiana Supreme Court discussed the evidentiary requirement of relevancy in *State v. Franklin*, 353 So.2d 1315 (La. 1977). In balancing the relevance or probative value of certain evidence, as defined by La. R.S. 15:441 (now codified at La. C.E. art. 401), with its potential for undue prejudice, a court must consider several factors: the danger that the evidence may unduly arouse the jury's emotions of prejudice, hostility, or sympathy; the probability that the evidence may create a collateral issue which will unduly distract the jury from the main issue; delay in the trial; and the danger of unfair surprise. 353 So.2d at 1322. The *Franklin* case involved evidence concerning the foreign source of heroin and how it is distributed in the United States. The court found the evidence was relevant and "the danger was slight that the jury could have drawn the prejudicial inference that Franklin himself had smuggled the heroin." 353 So.2d at 1323.

Similarly, in the case before us, we do not believe the testimony of Mermelstein or Uribe-Munera, which focused on the culpability of the Cartel as the offeror in this murder-for-hire case unduly prejudiced the jury against the defendants tried herein. Any hostility the jurors may have felt would have been directed against the Cartel as a group. Testimony concerning the existence and practices of the Cartel did not create a collateral issue; rather, the Cartel was described as an integral part of this contract killing. Finally, the testimony neither delayed the trial nor surprised the defendants, and the jury was not given the impression that the atrocities of the Cartel were committed by the defendants themselves.

Considering in particular the testimony of Max Mermelstein, we find his testimony was useful to the jury in several respects. It provided the motive for the contractual murder of Barry Seal under the State's theory of the case. Evidence of motive is relevant even though motive is not an element of the crime of first degree murder. Mermelstein's testimony set the stage for his own involvement in the initial Seal murder contract and explained how he came to be involved in the contract. It also explained why he is now a member of the federal witness protection program. Finally, the testimony served to describe and identify the Cartel and its leaders as a party to the murder-for-hire contract on Seal's life. The trial judge was careful to admonish the jury to disregard certain inadmissible comments offered by Mermelstein, and he cautioned the prosecutor several times that he would not let the testimony go too far.

Likewise, to the extent the testimony of Uribe-Munera may be considered prejudicial, it was relevant and admissible nonetheless. His testimony was offered primarily to show the existence of the murder-for-hire contract. His testimony supported the proposition that the Cartel was a party capable of, and interested in, putting out a contract on

Seal's life. Furthermore, the strong cross examination of Uribe-Munera gave the jury a balanced perspective of the witness and his testimony.

While it is true the prosecutor offered the testimony in part to bolster the credibility of her witnesses, and to that extent constitutes *Giglio* material, we do not believe the provision of Louisiana law which prohibits the bolstering of a witness's credibility until after his credibility has been attacked has been violated. See La. C.E. art. 607(B). In addition to credibility, the evidence provided background information on these witnesses and the background for this murder, a relevant set of circumstances in almost any homicide prosecution. The trial judge did not err in failing to exclude the challenged testimony or in failing to grant a mistrial once the testimony had come into evidence.

Issue #3

***BRADY* MATERIAL**

The next issue raised by the defendants is the trial court's failure to require production by the State of certain evidence concerning two of the State's witnesses. Defendants sought production of the medical records of Uribe-Munera, certain inconsistent statements given by Uribe-Munera upon his arrest in the United States, and more extensive information concerning the plea bargains between any federal or state government entity and the State's witnesses, Uribe-Munera and Mermelstein. Defendants contend these witnesses were the only sources of proof regarding the contract to murder Barry Seal; therefore, a thorough assessment of their credibility with the benefit of the requested information was critical for purposes of impeachment on cross-examination.

The constitutional guarantee of due process requires the State, upon request, to produce evidence favorable to an

accused when the evidence is material to either guilt or punishment. *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L.Ed.2d 215 (1963). Evidence favorable to a defendant includes both exculpatory and impeachment evidence. *United States v. Bagley*, 473 U.S. 667, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985). Evidence is material only if there is a reasonable probability that had the evidence been disclosed to the defense the result would have been different. *Giglio*, supra. A reasonable probability is a probability sufficient to undermine confidence in the outcome. *State v. Rosiere*, 488 So.2d 965 (La. 1986).

Under Louisiana law, the prosecution is not required to provide unlimited discovery. La. C.Cr.P. art. 723. However, the State must comply with the requirements of *Brady* and its progeny, and the provisions of the Code of Criminal Procedure pertaining to discovery in criminal cases. La. C.Cr.P. art. 716 et seq.

La. C.Cr.P. art. 729.3 imposes on the State a continuing duty to disclose discoverable evidence, but a defendant's conviction may be reversed only if the State's noncompliance with discovery prejudiced the defendant. *State v. Johnson*, 544 So.2d 767 (La. App. 3d Cir. 1989). Louisiana law further provides that the right to confrontation does not include a blanket right to pretrial disclosure of any and all information that might, by any stretch of the imagination, be useful in contradicting unfavorable testimony. *State v. Davis*, 562 So.2d 1173, at 1176 (La. App. 4th Cir. 1990).

Concerning the specific evidence sought by the defendants, the State contends that it did not have possession, custody, or control of any of the requested information. The "long medical history" of Uribe-Munera is referred to in a brief medical summary which the State asserts was prepared by the United States Department of

Justice. The Department of Justice never gave the complete medical history to the State and it was therefore never passed along to the defendants. Similarly, the prosecutor informed the trial judge that she was not in possession of the transcripts of certain FBI interrogations of Uribe-Munera. She had only summaries of Uribe-Munera's three statements which were given to defendants upon request for discovery of Giglio material.

We know of no duty or obligation which would require the State to obtain such information for the defendants' discovery purpose. For instance, Louisiana law clearly holds that the State has no duty to obtain rap sheets on its witnesses. See *State v. Harvey*, 358 So.2d 1224 (La. 1978); *State v. Seifert*, 524 So.2d 160 (La. App. 4th Cir. 1988); and *State v. Vampran*, 491 So.2d 1356 (La. App. 1st Cir. 1886), writ denied, 496 So.2d 347 (La. 1986). Nor do we see how the requested information is material to the question of defendants' guilt in this case. Uribe-Munera's testimony concerned the existence of a contract on Barry Seal's life and the culpability of the Medellin Cartel and its leaders as parties to that contract. The credibility of his testimony does not directly affect the determination of guilt of the defendants tried herein.

Our analysis is similar concerning the plea bargain information sought by the defendants. They wanted more complete information on the crimes of Mermelstein and Uribe-Munera for which they have been granted immunity or leniency. The prosecutor insisted she had no more information than that which was already provided.

The trial court herein determined that the prosecutor provided all of the information in her possession in good faith. As in *Seifert*, the trial court found the State's response to be "good and sufficient." 524 So.2d at 164. Accordingly, we find no error in the trial court's decision on these

discovery matters. Nor do we find the defendants were prejudiced by the absence of the requested material.

Issue #4

POST ARREST STATEMENTS

The next issue we will address is assigned as error solely by defendant Vasquez. He contends the trial court erred in permitting the introduction of post arrest inculpatory statements obtained in violation of constitutional guarantees. He further complains of a comment made at trial by a witness for the State concerning his invocation of the right to remain silent.

We note initially that Vasquez did not timely file a motion to suppress inculpatory statements before or during the trial. This would ordinarily operate as a waiver of any alleged constitutional infirmities. *State v. Rios*, 528 So.2d 163 (La. App. 3d Cir. 1988), writ denied, 530 So.2d 83 (La. 1988). However, defendant contends the failure of his attorney to file the proper motions constitutes ineffective assistance of counsel, thus entitling him to a new trial. A claim of ineffective assistance of counsel is more properly raised in a petition for post conviction relief; where, however, the record contains evidence necessary to decide the issue and the alleged ineffectiveness is raised on appeal by an assignment of error, the court should consider the claim. *State v. Heacox*, 543 So.2d 101 (La. App. 3d Cir. 1989). We will therefore address Vasquez's contentions relating to his post arrest statements in an ineffective assistance of counsel context.

The Sixth and Fourteenth Amendments guarantee the defendant in a state criminal proceeding assistance of counsel for his defense. The United States Supreme Court has held that the right to counsel is the right to the effective assistance of counsel. *McMann v. Richardson*, 397 U.S. 759,

at 771, 90 S.Ct. 1441 at 1449, 25 L.Ed.2d 763 (1970). In outlining the convicted defendant's burden of proof in an ineffective assistance case, the Supreme Court has established a two-part test. The defendant must show that a deficient performance on the part of his attorney prejudiced his defense. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

The first prong of the test examines whether the attorney violated some duty to the client. The second prong of the test requires a showing of prejudice, resulting from defense counsel's deficient performance, without which the result of the proceedings would have been different. The defendant must show there is a reasonable probability that, but for his counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial. *Strickland*, 466 U.S. at 694, 104 S.Ct. at 2068.

We need not address whether counsel for Vasquez was deficient in the performance of his duties in this case because we find the failure to file the appropriate suppression motions did not prejudice Vasquez to the degree required by *Strickland* for a successful ineffective assistance claim. Before a confession or inculpatory statement can be introduced into evidence, the State has the burden of affirmatively proving that the statement was free and voluntary and not made under the influence of fear, duress, intimidation, menaces, threats, inducements, or promises. La. R.S. 15:451. In the instant case, the record reflects that on each occasion in which Vasquez was interviewed by law enforcement officials, he was advised of his Miranda rights, both orally and in writing. There is no evidence that Vasquez was under the influence of coercion, duress, threats, or promises. Before each interview commenced, he signed a waiver of rights form. Michael Thompson, an investigator

with the East Baton Rouge Parish District Attorney's Office, testified that when Vasquez was interviewed, he showed an ability to speak and understand the English language and conversed very well with law enforcement officials. There is nothing to indicate Vasquez did not understand his rights or the fact that he was waiving those rights by talking to the investigators.

Vasquez argues additionally that the post arrest statements should be suppressed because they were made subsequent to his invoking the right to counsel in violation of the rule articulated by the Supreme Court in *Edwards v. Arizona*, 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981). The State responded in oral argument that the post arrest statements were initiated by Vasquez, giving rise to the one exception to the *Edwards* rule of suppression. The record contains no evidence on either side of this issue. We have nothing properly before us from which we can resolve this factual dispute.

The State proved the free and voluntary nature of the post arrest statements made by Vasquez. Therefore, any alleged deficiency in the performance of Vasquez's attorney stemming from his failure to file a motion to suppress did not result in prejudice sufficient to render that performance ineffective under *Strickland*. The trial judge did not err in permitting introduction of these post arrest inculpatory statements.

Vasquez next contends the trial court erred in failing to grant a mistrial or, at the very least, to give a curative instruction to the jury after FBI special agent Jorge Fernandez commented on his invoking the post arrest right to remain silent.

The comment appears in the record as follows:

A. Towards the end of the interview being conducted by agent Presutti at which time Vasquez he [sic] indicated he didn't want to answer any further questions and I — and he then said he didn't understand English very well.

MR. WALKER:

Your Honor, objection. Can we approach the bench?

THE COURT:

Okay.

MR. WALKER:

I would make an objection at this time, Your Honor, and move for mistrial based upon the fact that this witness has indicated that my client has exercised his constitutional Fifth Amendment right.

Defendant Vasquez contends that the denial of a mistrial in this instance constitutes reversible error. We disagree.

This issue has been dealt with numerous times in Louisiana jurisprudence. In *State v. Smith*, 336 So.2d 867 (La. 1976), a police officer who had interviewed the defendant testified that the defendant refused to give a statement to the officers. The defendant moved for mistrial but the trial court denied the motion, failed to give a cautionary instruction (though one would have been proper), and allowed the trial to continue. The Louisiana Supreme Court affirmed the trial court's ruling:

> After the objection was overruled, no other evidence or comment of the prosecutor in the record refers to the defendant's pre-trial silence. The trial as a whole was fairly conducted, the proof of guilt is strong, and the State made no use for impeachment of the defendant's custodial silence.
>
> We are therefore unwilling to hold that a mistrial is required because of the incidental and almost inadvertent (although improper) reference to the accused's custodial silence in two lines of a 101-page trial transcript, especially in the absence of any indication of the deliberate intent of the State to inject or exploit the issue (and also considering the uncertainty, until this opinion, of the Louisiana jurisprudence as to this precise issue).
>
> Although the issue is close, we thus for the reasons stated find no abuse of the trial court's discretion in its denial of a mistrial.

336 So.2d at 869-870.

In *State v. Kersey*, 406 So.2d 555 (La. 1981), an officer who interviewed the defendant stated at trial that after giving a detailed statement, the defendant asserted his right to remain silent. The Louisiana Supreme Court found this did not constitute reversible error:

> In this case, however, the reference to defendant's post-arrest silence does not appear to be for the purpose of simply calling the jury's attention to it or having the jury make an inappropriate inference. When the objected to questioning is read in context with the rest of that officer's testimony, it is clear that the reference was made in an attempt to show that the entire

> statement made to the officers had been provided to the jury. According to the witness police officer, defendant was advised of his *Miranda* rights and then willingly answered a succession of questions. He made some statements that were exculpatory and some that were inculpatory in effect. The reference to defendant's post-arrest silence arose at the close of the officer's testimony and was more a way of exploring how the interrogation was concluded than an effort to call attention to the silence.

406 So.2d at 559.

In the case before us, Vasquez talked at length with officers concerning the Seal investigation before stating that he wished to stop the interview. The reference to the assertion by defendant Vasquez of his right to remain silent was followed immediately by the comment that he did not understand English thoroughly. This explanation or rationale provided a context within which Vasquez invoked his right to remain silent. The implication to the jury was that Vasquez found himself lost in the English conversation, not that he had anything to hide. While the trial judge certainly could have given a cautionary instruction in this instance, we do not believe the failure to do so, or the failure to grant a mistrial, was reversible error under these circumstances.

Issue #5

GUNSHOT RESIDUE TEST

The next assignment of error is raised solely by defendant Velez. He contends the trial court erred in denying his motion to suppress the results of a gunshot residue test which was performed upon him 13 hours after Barry Seal was murdered. The record in the instant case

shows that after Velez was arrested, a neutron activation or gunshot residue test was performed during which Velez's hands were swabbed and tested for levels of antimony and barium. Velez registered high levels of barium, but extremely low antimony levels. Jim Churchman, a forensic scientist with the Louisiana State Police Crime Lab, explained that these tests are normally not conducted more than six hours after the firearm was allegedly handled or discharged due to dissipation of the particles on the person's hands which would make a positive test result unlikely even if the person had in fact handled or discharged a firearm.

Churchman stated that although the high barium levels on Velez's hands were suggestive evidence that he had handled or fired a weapon, he was unable to conclusively so state. Velez contends the results of the neutron activation test were highly unreliable and created prejudice sufficient to require a reversal.

Our Supreme Court has noted that scientific tests and expert opinions based thereon are admissible if the scientific principle is generally considered reliable and accurate by the scientific community. *State v. Boyer*, 406 So.2d 143 (La. 1981). The *Boyer* court pointed out that neutron activation tests are the subject of widespread acceptance, but cautioned that a test is no more reliable than the person who conducts it.

The test in the instant case was conducted by Jim Churchman, who has conducted in excess of 500 neutron activation tests in his experience as a forensic scientist. He received training from the manufacturer of the test kits and from the Alcohol, Tobacco and Firearms Laboratory in Atlanta, Georgia. The record reflects Churchman was competent to conduct the test at issue herein.

Evidence which "tends to show the commission of the offense and the intent, or tends to negate the commission of the offense and the intent" is relevant. See formerly, La. R.S. 15:441 and the current rule now codified at La. C.E. art. 401 which states, " 'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Any evidence, whether direct or circumstantial, is relevant if it tends to prove or disprove the existence of a material fact. *State v. Williams*, 486 So.2d 889 (La. App. 1st Cir. 1986), writ denied, 489 So.2d 915 (La. 1986).

The neutron activation test performed upon defendant Velez was inconclusive, but was nonetheless relevant and properly introduced at trial. An individual piece of evidence need not constitute proof positive of the material issue to be relevant and admissible. The evidence must simply have a tendency to make a consequential fact more or less probable. *State v. Ludwig*, 423 So.2d 1073 (La. 1982).

The test in question suggested that Velez had recently handled a weapon. This evidence was not conclusive, however, and Velez's attorney was able to point out a number of factors attacking the significance of the test results. The jury was properly allowed the opportunity to weigh this evidence and evaluate its significance as they saw fit. Accordingly, we find no error in the trial court's denial of Velez's motion to suppress the results of the gunshot residue test.

Issue #6

IDENTIFICATIONS

Defendant Cruz assigns as error the trial court's refusal to allow the testimony of Dr. Gary Wells, a proffered expert on eyewitness identification. He also contends the trial court

erred in refusing to hold an evidentiary hearing on the reliability and admissibility of the identification testimony of Benny Louis. Similarly, defendant Velez contends the trial court erred in allowing introduction of an identification by eyewitness Robert Lane.

The issue of expert testimony pertaining to eyewitness identification has previously been addressed by the Louisiana Supreme Court in *State v. Stucke*, 419 So.2d 939 (La. 1982). That case contains a thorough review of jurisprudence concerning the acceptance or rejection of expert testimony in the area of eyewitness identification. The court cited cases from various state courts in which such expert testimony was offered and rejected at trial. The *Stucke* court affirmed the refusal of the trial court to allow testimony regarding eyewitness identification, and concluded:

> [T]he prejudicial effect of such testimony outweighs its probative value because of the substantial risk that the potential persuasive appearance of the expert witness will have a greater influence on the jury than the other evidence presented during the trial. Such testimony invades the province of the jury and usurps its function.

419 So.2d at 945. The holding of the Louisiana Supreme Court in *Stucke* represents the current state of the law on this issue in Louisiana. We decline to deviate from that rule.

Concerning the surprise identification of defendant Cruz at trial, the record reflects that Benny Louis testified concerning his memory of the shooting. He indicated that he was uncertain of his ability to identify anyone. Louis then concluded his testimony and left the courtroom. A short time later, after Louis met with a State investigator, he returned to the stand and identified Cruz as the shooter in

the murder of Barry Seal. Counsel for both the defense and the prosecution were surprised by the identification.

The trial court granted defense counsel's request for a recess and excused the jury from the courtroom. At the conclusion of the recess, defense counsel questioned Louis extensively concerning factors which could affect the reliability of his identification of Cruz.

The purpose of discovery rules in criminal trials is to eliminate unwarranted prejudice from surprise trial testimony. *State v. Toomer*, 395 So.2d 1320 (La. 1981). However, these rules will not allow a defendant to exclude testimony solely because it comes as a surprise to him. Although La. C.Cr.P. art. 729.3 imposes a continuing duty upon the prosecution to disclose additional evidence to the defense when it discovers same, the State is under no duty to disclose information which it does not possess. *State v. Williams*, 448 So.2d 659 (La. 1984). Therefore, exclusion of evidence is a sanction which is not available when the State has uncovered evidence at an inopportune time for the defense. *Williams*. Because the prosecutor did not learn of Louis' ability to identify Cruz until after Louis was recalled to the stand, the State did not have possession of this information in sufficient time to disclose it to defense counsel. Therefore, the trial court did not err in refusing to exclude this testimony based on surprise.

Cruz next contends the identification was tainted by contamination from pretrial publicity and a discussion with a State investigator. A defendant who seeks to suppress an identification must prove that the identification was suggestive and that there was a likelihood of misidentification in the identification procedure. *State v. Lowenfield*, 495 So.2d 1245 (La. 1985), cert. denied, 476 U.S. 1153, 106 S.Ct. 2259, 90 L.Ed.2d 704 (1986); *State v. Prudholm*, 446 So.2d 729 (La. 1984). Defendant did not

prove the identification was suggestive, nor did he establish a likelihood of misidentification in this instance. His cross examination of Louis was extensive and thorough, and the particulars concerning reliability brought out at that time must go to the weight, rather than the admissibility, of Louis's in-court identification.

Cruz also argues the trial court erred in failing to conduct an evidentiary hearing on the admissibility of Louis' identification. However, the record does not indicate that Cruz requested such a hearing at trial. An irregularity or error cannot be availed of after verdict unless it was objected to at the time of occurrence. La. C.Cr.P. art. 841. Since defense counsel never requested an evidentiary hearing, any alleged error in this regard cannot be asserted on appeal.

We now consider Velez's argument concerning the identification by Robert Lane. Velez contends that because Lane was shown a passport photograph of Velez prior to his viewing a lineup, the identification at the lineup was unduly suggestive. In accordance with the rule of *Lowenfield* and *Prudholm*, Velez argues the identification was suggestive and resulted in a likelihood of misidentification. The facts suggest otherwise. Lane testified that he observed the individuals at the murder scene for seven to ten minutes. He further described the driver as tall and wearing scrub pants, consistent with an accurate description of Velez. In addition, Lane made an in-court identification of Velez independent of the lineup. Considering these facts, the suggestive nature of Lane's identification goes to the weight, rather than the admissibility of the identification. Further, we find no proof of a likelihood of misidentification.

Accordingly, we find no error in the trial court's refusal to exclude or suppress the identifications by Robert Lane and Benny Louis. Nor did the trial court err in disallowing the expert testimony of Dr. Gary Wells.

Issue #7

JURY CHARGE OBJECTION

Defendants Vasquez and Cruz allege the trial court erred in not providing a transcript of the jury charge conference at which the defense unsuccessfully argued entitlement to a special instruction on identification by an eyewitness. The charge conference is not contained in the record on appeal. Because of this omission, defendants contend they cannot present their argument as to why they were entitled to this special jury instruction. From the arguments of counsel and the record before us, we are unable to discern whether the charge conference was recorded and simply not transcribed, or whether it was not recorded at all.

Defendants have the burden of making a contemporaneous objection concerning any portion of the record which may not have been transcribed and lodged with the appellate court. Since defendants did not timely object, they cannot complain of the trial court's failure to provide a transcript of the jury charge conference.

If, on the other hand, the charge conference was not recorded, we must look to the requirements of La. C.Cr.P. art. 843 which provides;

> In felony cases . . ., the clerk or court stenographer shall record all of the proceedings, including the examination of prospective jurors, the testimony of witnesses, statements, rulings, orders, and charges by the court, and objections, questions, statements, and arguments of counsel.

Although Article 843 does require a full recording of every felony trial, our jurisprudence has held that an inconsequential omission from a record which is immaterial to a proper determination of the appeal does not require

reversal of a conviction. *State v. Johnson*, 438 So.2d 1091 (La. 1983); *State v. Richardson*, 529 So.2d 1301 (La. App. 3d Cir. 1988), writ denied, 538 So.2d 587 (La. 1989). The inconsequential omission in *Johnson* was counsel's argument on the introduction of a hearsay statement, while in *Richardson*, the omission included the arguments of all counsel and the trial judge's reasons for ruling on each objection made at trial.

Similarly, in the case before us, the jury charge conference contained the arguments of counsel and the trial judge's reasons for ruling on the defendant's request for a special charge on the subject of eyewitness identification. We find the failure to record this conference is an inconsequential omission immaterial to a proper determination of the issue at hand. The defendants formally objected on the record to the absence of their requested special charge, and the trial judge overruled their objection, with reasons, on the record.

We now consider defendants' related assignment of error, that the trial court erred in denying their request for a special jury instruction regarding factors that the jury must consider when evaluating the testimony of the witnesses who identified them.[5]

Defendants argue their entire defense was predicated on misidentification by the State's eyewitnesses. Defendants claim the jury knew what the issue was, but was left with no guidance to evaluate the sole defense of misidentification. The following charge was given to the jury by the trial judge:

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[5]We will consider this issue given our analysis concerning the recordation of the jury charge conference, even though the defendants have not complied with the requirement of La. C.Cr.P. art. 807 that a proffered special charge must be in writing.

> As the sole judges of the credibility of witnesses and of the weight their testimony deserves, you should scrutinize carefully the testimony and the circumstances under which the witness has testified.
>
> In evaluating the testimony of a witness, you may consider his or her ability and opportunity to observe and remember the matter about which he or she testified, his or her manner while testifying, any reason he or she may have for testifying in favor for or against the State or the defendant, and the extent to which the testimony is supported or contradicted by other evidence.

After the jury instructions had been given, defense counsel objected to the court's failure to give a special jury instruction regarding eyewitness testimony. The trial judge overruled defendants' objection and stated:

> Let the Record reflect that the charge in the Court's opinion was adequately covered in the general charge and thus the reason for not wanting to do so is because of possible prejudice would result in the Court's pinpointing a particular area of the evidence.

La. C.Cr.P. art. 807 provides that a requested special charge shall be given by the court if it does not require qualification, limitation, or explanation, and if it is wholly correct and pertinent. It need not be given if it is included in the general charge or in another special charge to be given.

The instructions given in this case are very similar to instructions given in other cases involving the defense of misidentification. In *State v. Foy*, 439 So.2d 433 (La. 1983), the trial judge instructed the jury that as the sole judges of

the weight and credibility of witnesses, they should scrutinize the circumstances under which the witnesses testified, their manner while testifying, and their ability and opportunity to remember. Additionally, the judge told the jury to consider any reason the witnesses may have for testifying in favor of or against the State or the defendant, and the extent to which the testimony is supported or contradicted by other evidence. In finding the judge had properly instructed the jury, the court stated, "to have given the requested special charges on the identification issue would have improperly pinpointed this issue out of proportion with others in the case." *Foy*, 439 So.2d at 437. See also *State v. Stewart*, 357 So.2d 1111 (La. 1978).

Defendants cite *State v. Hills*, 241 La. 345, 129 So.2d 12 (1960) (on rehearing), in support of their argument that where the sole defense is misidentification, the trial court should give a special charge on the subject. However, in *Hills*, the matter of identification was not covered or even referred to in the general charge. The Supreme Court concluded that such a charge should be included in the main charge, as was the case herein.

Defendants also contend the general jury charge was inadequate when compared to the charge given in *State v. Wiggins*, 556 So.2d 622 (La. App. 5th Cir. 1990). In *Wiggins*, the judge instructed the jury to consider how much time had passed between the crime and the first identification by the witnesses, and whether the witnesses seemed certain at the time of the first identification and again when they testified in court. The appellate court found the charge satisfactorily instructed the jury on the State's burden of proving the defendant's identity, and that the defendant's requested charge was fully incorporated therein. While it is true that the charge given herein is not identical to the *Wiggins* charge, it was sufficient nonetheless. Unlike the *Wiggins* jury, the jury in the present case was instructed to consider

the witnesses' reasons for testifying, manner while testifying, and whether their testimony is supported or contradicted by other evidence. Accordingly, we find no error in the jury charges given in this case, or in the trial court's failure to include defendants' requested charge on eyewitness identification testimony.

Issue #8

SEVERANCE

Defendants Vasquez and Cruz assign as error the trial court's refusal to grant them a severance from defendant Velez. Only Vasquez has briefed the issue. Vasquez contends he was entitled to a severance when the State introduced other crimes evidence through witnesses Max Mermelstein and Luis Carlos Uribe-Munera which was in no way connected to him. Vasquez further contends that a severance was required because of antagonistic defenses among the defendants and the radically different role which he allegedly played in the charged offense as opposed to codefendants Cruz and Velez.

La. C.Cr.P. art. 704 provides:

> Jointly indicted defendants shall be tried jointly unless:
>
> (1) the state elects to try them separately; or
>
> (2) the court, on motion of the defendant, and after a contradictory hearing with the district attorney, is satisfied that justice requires a severance.

When a defendant moves to sever, the defendant carries the burden of proving that a severance is required. *State v. Bradford*, 367 So.2d 745 (La. 1978). In *State v. McGraw*, 366

So.2d 1278 (La. 1978), the court pointed out that persons jointly indicted are not entitled to a severance of trial as a matter of right, but rather, the grant or denial of a motion for severance lies within the discretion of the trial judge whose ruling will not be interfered with unless exercised arbitrarily or to the prejudice of the accused. *McGraw*, 366 So.2d at 1283. The *McGraw* court went on to explain that the mere allegation of antagonistic defenses is insufficient, as an accused must show actual prejudice resulting from a joint trial. Furthermore, the actual prejudice standard requires a showing that defendant would probably not have been convicted had be been accorded a separate trial.

The denial of a severance to defendant Vasquez was not error. Under the actual prejudice standard outlined in *McGraw*, Vasquez failed to show that he probably would not have been convicted if accorded a separate trial. The record contains substantial competent evidence of Vasquez's guilt, independent of any "guilt by association" implication which may have arguably come from the testimony of Mermelstein and Uribe-Munera. This evidence included, but was not limited to, fingerprint evidence, hotel, airline, and rental car records, inculpatory actions and statements, and certain purchases made just prior to the murder of items used in connection with the murder.

Vasquez also contends a severance was required because of antagonistic defenses among the defendants and the radically different role which he played in the alleged offense. We note first that defendants did not have antagonistic defenses within the meaning of *McGraw*, as none of the three intended to cast blame upon the others. Furthermore, justice does not require severance where only the extent of participation of each defendant is at issue. *State v. Gaskin*, 412 So.2d 1007 (La. 1982); *State v. Simmons*, 381 So.2d 803 (La. 1980), cert. denied, 449 U.S. 1036, 101 S. Ct. 612, 66 L.Ed.2d 498 (1980). As in *Gaskin* and

Simmons, the evidence adduced herein indicates all three defendants were culpable as principals. The fact that each defendant's role in the crime may have differed slightly or radically from the others is of no significance. Accordingly, we hold the denial of Vasquez's motion to sever did not constitute reversible error.

Issue #9

JURY MISCONDUCT

Velez, Vasquez, and Cruz next assign as error the trial court's denial of their motion to repoll the jury, conduct an evidentiary hearing, or grant a new trial based on an invalid verdict. Defendants contend that a note sent to the judge by two jurors, after the guilt phase of the trial and during the penalty phase, reflects an invalid verdict.[6]

Defendants were charged with first degree murder, which is a capital offense and requires a unanimous verdict. La. C.Cr.P. 782. After the verdict of guilty was returned, the trial judge asked the jury if this was their verdict and also asked if it was by unanimous vote. The jurors responded affirmatively as a group to both questions. The jury was then polled in writing, and unanimity was confirmed by the judge, clerk, and counsel.

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[6]The note read as follows:

> Your Honor,
> I made a decision of 2nd degree murder but was told it had to be 1st degree murder because of money involved.
> What can I do? I feel I was coerced. I'm having a hard time living with 1st degree. Please tell me something.
> W. Hartnell
>
> And I'm not the only one. I, Edna Shaw, feel that I was coerced in making a decision of 1st degree murder that I can not live with.
> Edna Shaw.

The following morning, when the note was given to the trial judge, defendants moved to repoll the jury and requested an evidentiary hearing, both of which were denied. The ruling was based on La. R.S. 15:470, now codified at La. C.E. art. 606, which prohibits a juror from testifying about jury misconduct or any matter that may explain, qualify, or impeach a verdict.

Our courts are required to take evidence upon well pleaded allegations of prejudicial juror misconduct which violates an accused's constitutional rights to due process, to confront and cross-examine witnesses, and to a trial by a fair and impartial jury. Upon a showing that a constitutional violation occurred and that a reasonable possibility of prejudice exists, a court must set aside a verdict and order a new trial. *State v. Graham*, 422 So.2d 123 (La. 1982), appeal dismissed, 461 U.S. 950, 103 S.Ct. 2419, 77 L.Ed.2d 1309 (1983); *State v. Sinegal*, 393 So.2d 684 (La. 1981). Furthermore, an exception to the rule of La. R.S. 15:470 exists when an unauthorized communication or act by a third person creates an extraneous influence on the jury. *State v. Copeland*, 419 So.2d 899 (La. 1982), cert. denied, 489 U.S. 1091, 109 S.Ct. 1558, 103 L.Ed.2d 860 (1989); *Sinegal*. In *Sinegal*, the jury was exposed to an incorrect statement of law from a 1916 law book. In reversing the defendant's conviction, the Supreme Court held that a new trial is mandated when there is a reasonable possibility that extraneous information considered by the jury affected its verdict. 393 So.2d at 686.

Conversely, jurors are not competent to testify about their deliberations or the mental processes of the jurors during deliberations. *Acosta v. Pendleton Memorial Methodist Hospital*, 545 So.2d 1053 (La. App. 4th Cir. 1989), writs denied, 551 So.2d 637, 638 (La. 1989). In *State v. Abney*, 347 So.2d 498 (La. 1977) the Supreme Court cited La. R.S. 15:470 and stated:

> [N]o juror is competent to impeach the verdict of the jury on which he served. The rule is founded on the public interest in finality of jury verdicts and in encouraging frankness of discussion among jurors in their deliberations. *State v. Ledet*, 298 So.2d 761 (La. 1974). This firmly-established rule prevents jurors from impeaching their verdict by disclosure of jury deliberations or even by testimony of misconduct within the jury room. *State v. Durr*, 343 So.2d 1004 (La. 1977).

347 So.2d at 502.

In the case before us, the note giving rise to this controversy was given to the trial judge after an overnight recess, and during the penalty phase of the trial in which photographs of the defendants' families were shown to the jury, letters from family members were read into the record, and one defendant's mother and brother came from Colombia to testify in person. There is nothing in the record to indicate that outside influences may have had something to do with the jurors' second thoughts. In fact, counsel for Velez noted to the trial court that the jury had not been separated and had not been affected by any outside influence.

The trial judge found the note indicated a second thoughts situation, merely a feeling by the two jurors in question, after thinking about their verdict. He did not believe the note in any way affected the validity or legality of the verdict or the constitutional rights of the accused. The trial judge stated, "Our system cannot operate upon second thoughts. We have to have a final adjudication. It has to be final."

Our review of the record indicates the note was sent to the judge the day after the jury unanimously found

defendants guilty. After the foreman read the verdict, the judge polled the jury orally as a group and individually in writing. There is no evidence of extraneous influence or coercion by a third person. We find, as did the trial judge, that the defendants' constitutional rights were not jeopardized. The defendants therefore were not entitled to an evidentiary hearing on jury misconduct or a new trial. The matter was within the trial court's discretion and we find, on review, no abuse of that discretion. The trial judge's ruling is affirmed.

Issue #10

ELEMENTS OF THE CRIME

Finally, defendants Velez and Vasquez contend the evidence adduced at trial was insufficient to support their first degree murder convictions. Defendant Cruz raised the issue as an assignment of error but did not brief or argue it in this appeal.

Louisiana law provides that when the issue of sufficiency of evidence is raised on appeal, the critical inquiry of the reviewing court is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt. *State ex rel. Graffagnino v. King*, 436 So.2d 559 (La. 1983). It is the role of the factfinder to weigh the respective credibilities of the witnesses, and this court will not second-guess the credibility determinations of the trier of fact beyond the sufficiency evaluations required by law.

In order for the State to obtain a first degree murder conviction, it must prove the essential elements of first degree murder beyond a reasonable doubt. In this case, the State sought convictions under paragraph 4 of La. R.S. 14:30 which reads:

A. First degree murder is the killing of a human being:

* * *

(4) When the offender has specific intent to kill or inflict great bodily harm and has offered, has been offered, has given, or has received anything of value for the killing.

According to this statute, the elements which must be proven beyond a reasonable doubt are the killing of a human being, the specific intent to kill or inflict great bodily harm, and the offer or exchange of something of value for the killing.[7]

When the evidence against defendant Velez is viewed in the light most favorable to the prosecution, we find Velez's first degree murder conviction must stand. Velez was present at a meeting where the murder of Barry Seal was discussed. He knew of the Medellin Cartel's reasons for wanting Seal dead, as well as the amount of money which would be paid to whoever completed the contract. At subsequent meetings, Velez expressed his interest in the contract on Seal's life, stating that he would complete the contract even if it meant killing Seal's wife and children in the process. The fingerprints of Velez were found in both vehicles connected to the murder. Additionally, Velez was placed at the murder scene by two eyewitnesses, Robert Lane and Alvin Ricks. The actions of Velez following the shooting are also indicative of guilt. Velez never checked out of the Airport

[7]La. R.S. 14:10 defines specific intent as "that state of mind which exists when the circumstances indicate that the offender actively desired the prescribed criminal consequences to follow his act or failure to act." Specific intent is a state of mind and need not be proven as fact, but rather, it may be inferred from the circumstances of the crime and the actions of the defendant. *State v. Graham*, 420 So.2d 1126 (La. 1982).

Hilton, but hired a taxi to transport him to Montgomery, Alabama. He was arrested in Meridian, Mississippi after his taxi hit a deer. In his possession were the keys to the getaway car, approximately $3,000 in cash, and luggage containing scrub pants. Eyewitness Robert Lane testified that the driver of the murder vehicle, whom he identified as Velez, wore scrub pants at the time of the murder.

After viewing all of this evidence in the light most favorable to the prosecution, we conclude any rational trier of fact could have found the elements of first degree murder were proven as to defendant Velez beyond a reasonable doubt. The fact that a killing occurred is not disputed; Velez's actions reflect his specific intent to kill the victim; and Velez, the jury could have reasonably concluded, was offered something of value for the killing, which offer he accepted. Velez was therefore properly convicted of first degree murder and sentenced accordingly.

We next consider the evidence presented against defendant Vasquez. The actions of Vasquez were tailored toward the successful completion of the murder of Barry Seal. He obtained the murder vehicle and the getaway car, as evidenced by car rental agreements and testimony. Vasquez arrived in Louisiana one week before Seal was murdered. During this week he checked into three different hotels, one located adjacent to and with a direct view of the Salvation Army halfway house where Barry Seal reported daily. Vasquez provided false information when he purchased the car which was used in the murder. He purchased clothing from a department store, which clothing was later used as props in the murder. Vasquez's fingerprints were found on the batteries inside a walkie-talkie which was found in the murder vehicle.

Within an hour and a half of the murder, Vasquez checked out of the Airport Hilton in New Orleans. While

under FBI surveillance, he abandoned a rented Lincoln and threw the keys, a rental agreement, a road map, black knit gloves, and a baseball cap into a dumpster. During post arrest interviews, Vasquez contradicted himself on numerous occasions. He denied ever having rented the red Cadillac, used as the getaway car, and became angry and teary eyed when confronted with a rental agreement in his name. He later admitted renting the car, but denied any knowledge of the walkie-talkies used during the murder. When confronted with the fact that his fingerprints were found on the battries inside the walkie-talkies, he ultimately admitted purchasing the batteries and testing the radios.

This evidence reflects Vasquez's specific intent to kill Barry Seal. His participation in the murder was significant and his actions represent that of a principal to the murder. The evidence does not, however, prove the offer or exchange of anything of value for the killing as to Vasquez. Vasquez did not enter the picture until February 12, 1986, approximately one week before the murder. The State offered no proof of a connection between the Cartel's contract, or offer, and Vasquez. Proof of a codefendant's connection to the contract (Velez), or the fact that $860 in cash was found on Vasquez when he was arrested (when the alleged bounty was $500,000), is not enough to prove beyond a reasonable doubt that Vasquez was acting pursuant to the contract on Seal's life. Therefore, we cannot affirm the first degree murder conviction of defendant Vasquez.

The evidence and testimony in this record do not provide reasonable support for the apparent conclusion that because the three defendants were acting together, they were all three part of the murder contract put out on Seal's life. The offer or exchange of something of value was an essential element of the offense charged herein which the prosecutor was required to prove with competent evidence. In fact, no evidence whatsoever was offered to link Vasquez to the

murder contract. Velez was linked to the contract by the testimony of Max Mermelstein whom the jury apparently found to be a credible witness. The State proved that a contract did exist and that Velez was acting pursuant to that contract. On the other hand, the State did not attempt to prove, and we cannot infer, that Vasquez was likewise acting pursuant to that contract.

In *State v. Bay*, 529 So.2d 845 (La. 1988), the State sought a first degree murder conviction based on a murder-for-hire contract. The Supreme Court found the evidence of such a contract to be uncorroborated and not credible and reversed the defendant's conviction. In the case before us, we have found no evidence of such a contract as to defendant Vasquez.

In determining the proper remedy for the erroneous conviction of Vasquez, we must consider Louisiana jurisprudence on the subject of principals and the relationship of multiple defendants in a trial.

Neither the law of principals nor the law of conspiracy can provide the legal basis to support the first degree murder conviction of Vasquez. First, the State did not attempt to prove defendants were acting pursuant to a conspiracy; they were neither tried nor convicted of the crime of conspiracy.

The defendants were, however, tried and convicted as principals in the murder of Barry Seal pursuant to La. R.S. 14:24, which provides:

> All persons concerned in the commission of a crime, whether present or absent, and whether they directly commit the act constituting the offense, aid and abet in its commission, or directly or indirectly counsel or procure another to commit the crime, are principals.

However, merely because each defendant may be a principal along with other principals does not mean that proof of the requisite elements of the crime against one principal constitutes proof of the same elements against other principals.

In *State v. Francis*, 486 So.2d 346 (La. App. 3d Cir. 1986), writ denied, 492 So.2d 1216 (La. 1986), this court found sufficient proof of the requisite specific criminal intent, on the part of the defendant, to kill or inflict great bodily harm on the victim. The defendant was properly convicted as a principal in the second degree murder committed by him and another principal. The court noted that both principals had the requisite specific criminal intent. Similarly, in *State v. Clay*, 441 So.2d 1227 (La. App. 1st Cir. 1983), writ denied, 446 So.2d 1213 (La. 1983), the defendant was convicted of second degree murder even though the victim was physically murdered by another individual. The court held:

> One who aids or abets in the commission of a crime may be charged and convicted with a higher or lower degree of crime, depending upon the mental element proved at trial. *State v. Watson*, 397 So.2d 1337 (La. 1981), cert. denied, 454 U.S. 903, 102 S.Ct. 410, 70 L.Ed.2d 222 (1981).

441 So.2d at 1234.

In *State v. West*, 568 So.2d 1019 (La. 1990), the court found the trial judge's jury instructions to be erroneous because the jury was not told it had to find specific intent on the part of this defendant in order to convict this defendant where his two co-perpetrators had previously been convicted of first degree murder. The Supreme Court determined the improper instruction could have led a reasonable juror to believe erroneously that he could transfer the mental state of

the defendant's co-perpetrators to the defendant, and thus satisfy the specific intent requirement needed to convict the defendant of first degree murder. 568 So.2d at 1025.

Both *State v. Watson*, 529 So.2d 94 (La. App. 4th Cir. 1988), writ denied, 535 So.2d 740 (La. 1989), and *State v. Smith*, 450 So.2d 714 (La. App. 4th Cir. 1984) involved the use of weapons by one of two codefendants. In *Watson*, an armed robbery and aggravated rape case, the evidence showed that one defendant carried a gun from the beginning of the encounter with the victim, fired a shot from the gun, and held it to the victim's head while the second defendant raped her. The jury could have reasonably concluded that the second defendant knew of the gun and therefore aided in the commission of the aggravated rape. 529 So.2d at 98. By contrast, in *Smith*, one defendant's armed robbery conviction was reduced to simple robbery because there was no evidence he knew of his codefendant's impulsive decision to pick up and use a hammer during the course of the robbery.

Given this jurisprudence, we cannot affirm Vasquez's first degree murder conviction. We need not, however, discharge him. The discharge of the defendant is neither necessary nor proper when the evidence supports a conviction on a lesser and included offense which was a legislatively authorized responsive verdict. *State v. Byrd*, 385 So.2d 248 (La. 1980). See also *Bay*, supra; *State v. Jones*, 426 So.2d 1323 (La. 1983); and *State v. Nugent*, 580 So.2d 1002 (La. App. 3d Cir. 1991). The evidence does support a guilty verdict of the lesser and included offense of second degree murder and we will order entry of judgment against Vasquez in accordance therewith.

We will not review the sufficiency of the evidence offered against defendant Cruz as he abandoned this assignment of error.

DECREE

For the foregoing reasons, we affirm the convictions and sentences of Miguel Velez and Luis Carlos Quintero-Cruz. We set aside the conviction and sentence of Bernardo Antonio Vasquez and remand to the district court for entry of judgment of guilty of second degree murder and resentencing in accordance with La. R.S. 14:30.1.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

THE SUPREME COURT OF THE
STATE OF LOUISIANA

NO. 91-K - 2532

STATE OF LOUISIANA

VS.

MIGUEL VELEZ, BERNARDO VASQUEZ,
and LUIS CARLOS QUINTERO-CRUZ

IN RE: Quintero-Cruz, Luis Carlos;—Defendant(s); Applying for Writ of Certiorari and/or Review; to the Court of Appeal, Third Circuit, Number CR90-0230; Parish of Calcasieu Fourteenth Judicial District Court Div. "G" Number 1904-87

January 31, 1992

Denied.

LFC
PFC
WFM
JLD
JCW
HTL
PH

Supreme Court of Louisiana
January 31, 1992

/s/ [ILLEGIBLE]
Clerk of Court
For the Court

THE SUPREME COURT OF THE
STATE OF LOUISIANA

NO. 91-K - 2505

STATE OF LOUISIANA

VS.

MIGUEL VELEZ, BERNARDO VASQUEZ,
and LUIS CARLOS QUINTERO-CRUZ

IN RE: Vasquez, Bernardo;—Defendant(s); Applying for Writ of Certiorari and/or Review; to the Court of Appeal, Third Circuit, Number CR90-0230; Parish of Calcasieu Fourteenth Judicial District Court Div. "G" Number 1904-87

January 31, 1992

Denied.

LFC
PFC
WFM
JLD
JCW
HTL
PH

Supreme Court of Louisiana
January 31, 1992

/s/ [ILLEGIBLE]
Clerk of Court
For the Court

THE SUPREME COURT OF THE
STATE OF LOUISIANA

NO. 91-K - 2510

STATE OF LOUISIANA

VS.

MIGUEL VELEZ, BERNARDO VASQUEZ,
and LUIS CARLOS QUINTERO-CRUZ

IN RE: Velez, Miguel;—Defendant(s); Applying for Writ of Certiorari and/or Review; to the Court of Appeal, Third Circuit, Number CR90-0230; Parish of Calcasieu Fourteenth Judicial District Court Div. "G" Number 1904-87

January 31, 1992

Denied.

LFC
PFC
WFM
JLD
JCW
HTL
PH

Supreme Court of Louisiana
January 31, 1992

/s/ [ILLEGIBLE]
Clerk of Court
For the Court

THE COURT: Oh, okay. No problem with that.

THE COURT: Okay, now, where were we. We need Mrs. LeLeux and Mrs. Guillory, and then Mrs. Charles has been sworn, correct? Yeah. Bring Mrs. Charles in.

(Jurors LeLeux, Guillory, and Mrs. Charles seated.)

THE COURT: In case you might be wondering, Mrs. Sisco was excused for reasons that don't concern you.

How do you do, Mrs. Charles?

MRS. CHARLES: Fine.

THE COURT: Okay. All three of you were present when I read the definition of first degree murder in the State of Louisiana?

(Jurors respond affirmatively.)

THE COURT: And all three of you were present when I discussed the function of the jury, if you reach the penalty phase?

(Jurors respond affirmatively.)

THE COURT: You understand we'll have two proceedings. The first will be guilt or innocence, and then if somebody be found guilty, then we move to the penalty phase. You understand that?

(Jurors respond affirmatively.)

THE COURT: We'll have a second trial. At that second proceeding, there will be evidence about aggravating circumstances or an aggravating circumstance, and there will be evidence as to mitigating circumstances. Do y'all understand what I'm saying?

(Jurors respond affirmatively.)

THE COURT: The State will try to persuade you that this case deserves your considering to recommend the death penalty, if we reach that phase. The Defense, on the other hand, will try to introduce mitigating circumstances which they would hope that would make you feel that the life imprisonment ought to be recommended instead of the death.

You understand that?

(Jurors respond affirmatively.)

THE COURT: My question to y'all is this: If y'all be picked to serve on this jury and if we reach the penalty phase, would y'all have any problems in dealing with the death penalty?

(Jurors respond negatively.)

THE COURT: Okay. I have a negative from all three. Do any of the three of you have any personal interest in the outcome of this case?

Do y'all understand? I can't hear you. Mrs. Charles, do you understand that?

MRS. CHARLES: Would you repeat the question, please?

THE COURT: Do you have any personal desire or hope on how you want this case to end?

MRS. CHARLES: No.

THE COURT: You say no?

MRS. CHARLES: No.

THE COURT: Okay. The other two no?

(Jurors respond negatively.)

THE COURT: Okay. Have any of the three of you — has anybody talked to any of the three of you concerning this case?

(Jurors respond negatively.)

THE COURT: Has anybody talked to y'all about this case?

(Jurors respond negatively.)

THE COURT: Okay. I have negatives from all three. Do any of the three of you have any personal knowledge about the case either from relatives or friends or from the news media, from T.V. or radio or the newspaper?

(Jurors respond negatively.)

THE COURT: Anybody?

MRS. CHARLES: Not very much.

THE COURT: Well, let's pass the mike to Mrs. Charles. Hold it close to your mouth so I can hear you. I'm getting old. I can't hear too well.

MRS. ROSA M. CHARLES previously sworn

EXAMINATION BY THE COURT:

Q You say not very much.

A Well, it's just what you — what I heard over here, what you said about it. I don't know anything too much about it.

Q Did you hear anything from T.V. on it?

A No, not lately.

Q How about newspaper?

A No.

Q You said not lately?

A Well, it's been a long time when it first happened.

Q Okay. Well, after you saw whatever it is you saw, did you discuss it with anybody?

A No.

Q And because of what you saw, did you form any ideas or conclusions or opinions as to the facts in this case?

A No.

Q Or as to the guilt or innocence of these defendants?

A No.

* * *

THE COURT: Okay. So, the three of you, if picked, could decide this case solely and only on the evidence presented in this courtroom and the law as I give it to you, is that right?

(Jurors respond affirmatively.)

THE COURT: Everybody agree with that? Mrs. LeLeux, I didn't see anything from you .

MRS. LELEUX: Yeah.

THE COURT: Okay. Y'all speak up. I can't hear you. Y'all understand that if you're picked to serve on this jury, y'all are going to be sequestered. I'm going to put you in the custody of the sheriff, and he'll provide you with lodging, with meals, at State expense, but he will not permit anyone not on the jury to come into contact with you. There'll be no family visits, no telephone calls.

Any mail that you get or send is going to be censored. I'll let y'all watch television, but just as a group and when the news is not on. You can have reading material, but only if it doesn't have any reference to this case or any other case, any other criminal case. Would service on the jury under those conditions create an undue hardship upon you? And notice I said undue.

MRS. EULA S. LELEUX

EXAMINATION BY THE COURT:

* * *

THE COURT: Mrs. Charles?

MRS. CHARLES: No problem.

THE COURT: Okay. Now, you understand also that if you're chosen to serve on this jury, you're going to have to accept the law as I give it to you. Your job will be to sit and listen to the evidence and the arguments of counsel when this case is over, but I'm going to tell you what the law is that applies.

My question is this: Can you accept the law as I give it to you, even though you may not think that law is right?

MRS. EULA S. LELEUX

BY THE COURT:

* * *

THE COURT: Mrs. Charles, do you?

MRS. CHARLES: No problem.

THE COURT: Okay.

BY THE COURT:

* * *

THE COURT: Yeah, I think I've gone through the publicity and all that, and this just came out as an afterthought through some other question.

Okay. Let me get to the law, because I've already discussed the sequestration, too. Let me get to the law. I think I went into it, I was starting to, but I want to be sure y'all understand this.

You understand if you're picked on the jury you're going to have to accept the law as I give it to you?

(Jurors respond affirmatively.)

THE COURT: That's my job. Your job is to listen to the evidence and the arguments of counsel, but my job is to tell you the law. Now, I may have asked you this, but I'll ask you again.

Can you accept the law as I give it to you, even though you may not think that law is right? I think that's the point I was at when Mrs. LeLeux come up — Can y'all accept that law?

(Jurors respond affirmatively.)

THE COURT: All right. Let me tell you a little bit about the law to kind of acquaint you. In a criminal case, a defendant is presumed innocent until and unless the State with competent evidence proves to your satisfaction that he is guilty beyond a reasonable doubt. Can y'all accept that?

(Jurors respond affirmatively.)

THE COURT: A reasonable doubt means exactly what it says, a doubt that is reasonable, a doubt that you can give a sensible reason for. It's a doubt that has a real, tangible basis.

It's the same kind of doubt that you would permit to influence you in your everyday business affairs. It is not

something just imaginary or frivolous. Okay? Can y'all accept that?

(Jurors respond affirmatively.)

THE COURT: Mrs. LeLeux?

MRS. LELEUX: Yes, sir.

THE COURT: A defendant in a criminal case, and in this case, doesn't have to prove his innocence. That's not the American way. The defendant walks in innocent, and he stays innocent until the States proves his guilt, just like I said, beyond a reasonable doubt.

You can accept that?

(Jurors respond affirmatively.)

THE COURT: Consequently, a defendant doesn't have to do anything, nothing at all, if he doesn't want to. He doesn't have to take the stand, he doesn't have to put on any evidence if he doesn't want to.

Now, if these defendants in this case choose not to take the stand, for whatever reason, or chose not to put on any evidence for whatever reason, would y'all hold that against them?

EULA S. LELEUX

BY THE COURT:

* * *

THE COURT: Do you understand that, ma'am, Mrs. Charles?

MRS. CHARLES: I do.

THE COURT: So, this isn't going to be like — This isn't like T.V. It may be, it may be, I don't know, but they may not want to take the stand for whatever reason. I don't know.

They may choose not to take the stand and testify. They may not choose to tell you their side, if they don't wish to, or they may choose not to put on any evidence whatsoever.

If they don't do this, would you hold it against them? Mrs. LeLeux?

MRS. LELEUX: No.

THE COURT: Okay. And last, the mere fact that they've been charged with a crime, which we call an indictment, the mere fact that they've been charged, the mere fact that they're here doesn't mean anything, so far as their guilt is concerned. That is not evidence. It's just an accusation, and you can't let that affect your thinking in any way. Can you accept that?

(Jurors respond affirmatively.)

THE COURT: All right. State?

MR. LOTWICK: Thank you, Judge.

BEATRICE S. GUILLORY

BY MR. LOTWICK:

* * *

(Juror Guillory excused.)

THE COURT: Mrs. LeLeux, you don't have a 23-month old, do you? Mrs. Charles?

MRS. CHARLES: No, I don't. No, I don't.

THE COURT: Okay.

* * *

THE COURT: Okay. Neither one of y'all got a 23-month old baby?

(Jurors respond negatively.)

THE COURT: Okay. Sorry.

MR. LOTWICK: Ladies, I have a few points that I would cover with you, and I guess it's a good idea to do this because it seems maybe Mrs. Guillory didn't understand the question that the Judge asked her about whether or not jury service for several weeks would be a hardship to her, and I guess maybe it's a possibility that with other questions that I've asked and answered, they come in such rapid fire that not everyone always understands those things.

So, if you think as we go along that you didn't understand some of the things we've already discussed, would you say so?

(Jurors respond affirmatively.)

EULA S. LELEUX

BY MR. LOTWICK:

* * *

MR. LOTWICK: Well, as we've said a couple of times already, the jury that we're selecting here this week is going to have a couple of functions.

The first one is going to be one that any other jury in a criminal case would serve, which would be to decide the question of guilt or innocence of the defendants, and there are three defendants on trial. You recall that from the introductions that we had earlier in the day?

Mrs. Charles, you recall all three of the defendants?

MRS. CHARLES: Uh-huh.

MR. LOTWICK: All three of them are charged with first degree murder, and as the Judge said, the State intends to seek the death penalty as to all three, should we reach that stage of the trial. During the first part of the trial, the State will present evidence in support of the charges of first degree murder. The defendants have an opportunity to present evidence if they want to, and it's up to them, they don't have to.

But, after all the evidence has been presented, the jury will retire, have a duty to come back into court with a verdict on the question of guilt or innocence. At the close of that stage, or after that's been done, if the jury has found one, two, or all three of the defendants guilty of first degree murder, then we'll go into the sentencing phase, and at that time the State will have an opportunity to present evidence of so-called aggravating circumstances, and they're specifically listed in the law, and you would find out more about that at that time, the proof of which would justify and make proper for the jury to consider the death penalty.

When we reach that point, the defendants have the opportunity to present evidence of mitigating circumstances,

such as might persuade the jury to vote for life imprisonment instead of the death penalty, and then the jury would retire a second time to see if it can agree on which penalty to recommend to the Court. And that is, very briefly, the procedure that we'll follow. You follow me on that, Mrs. LeLeux?

MRS. LELEUX: Yes, sir.

MR. LOTWICK: How about you, Mrs. Charles?

MRS. CHARLES: Yes.

EULA S. LELEUX

BY MR. LOTWICK:

* * *

MRS. ROSA M. CHARLES

BY MR. LOTWICK:

Q How about you, Mrs. Charles? Is there any reason that you know of why you couldn't participate in both stages of this trial?

A I run the First Church of Christ Day Care.

THE COURT: I can't hear you, ma'am.

BY THE JUROR:

A But I got somebody to take my place.

BY MR. LOTWICK:

Q You run the day care?

A Uh-huh.

MR. LOTWICK: The statute that these defendants are charged with is a violation of the first degree murder statute which says that first degree murder is the killing of a human being when the offender has specific intent to kill or inflict great bodily harm and has offered, has been offered, has given or has received anything of value for the killing.

That is what we might call the definition of a contract killing, or a murder for hire.

EULA S. LELEUX

BY MR. LOTWICK:

* * *

MR. LOTWICK: I hate to make you do this, but I guess I'm going to be asking some of these questions in a way that's going to make it best that if we'd just pass that microphone back and forth and maybe just hold it over towards each other.

How about your, Mrs. Charles? Can you accept and follow that definition?

MRS. CHARLES: Yes.

MR. LOTWICK: The reason that we find all three of these defendants on trial here is because of a part of our law which is called principals. You notice that there are three defendants here on trial, and as you might suspect, we intend and expect to show that only one of them actually

shot the victim to death. We don't contend that all three of them shot the victim, but only that one did.

However, because of the part of our law which defines principals in our section of the code called parties to crimes, we do intend to ask the jury to find all three of them guilty.

Let me read to you the definition of principals, and then we'll talk about that just for a second. This paragraph says all persons concerned in the commission of a crime, whether present or absent, and whether they directly commit the act constituting the offense, aid and abet in its commission or directly or indirectly counsel or procure another to commit the crime are principals.

And under our law, all persons concerned in the commission of a crime who fit under that definition can be found guilty of the crime charged, if they participate, in this case, knowingly participate, concerned in the commission of the first degree murder. You follow me on that?

MRS. LELEUX: Yes.

MR. LOTWICK: Mrs. Charles?

MRS. CHARLES: Yes.

MR. LOTWICK: And it's not necessary, when applying the definition of principals, for the jury to consider to what degree each person participated. If the jury finds the person participated and was concerned in the commission of the crime, aided and abetted in the commission of the crime under that paragraph that I just read, then a proper verdict would be to find the person guilty, in this case, whether the person was the trigger man or played some other role. You follow me, Mrs. LeLeux?

MRS. LELEUX: Yes, sir.

MR. LOTWICK: Mrs. Charles?

MRS. CHARLES: Yes.

MR. LOTWICK: And as I said, we intend to ask for the death penalty as to each one of the three, the trigger man or not.

At the first stage of the trial in this case, if the evidence convinces you that one of these defendants has been proven guilty and, in fact, has been proven beyond a reasonable doubt to have been the trigger man in this case, to have actually killed the victim, could you vote to find him guilty of first degree murder?

EULA S. LELEUX

BY MR. LOTWICK:

* * *

MRS. ROSA M. CHARLES

BY MR. LOTWICK:

Q Mrs. Charles, how about you? Taking the defendants again just briefly one by one, if the evidence proves that one of these defendants was the trigger man in this case and actually shot the victim to death and has been proved guilty beyond a reasonable doubt of first degree murder, could you vote to find him guilty of first degree murder?

A Yes.

Q Could you listen to the aggravating and mitigating circumstances and, if appropriate, vote to recommend the death penalty for them?

A Yes.

Q As to a second defendant who was present at the scene of the crime, but did not shoot anybody, but who was, under the definition of principals, guilty, could you vote to find him guilty?

A Yes.

Q Could you under the appropriate circumstances, after listening to a the aggravating and mitigating evidence, vote to recommend that he be sentenced to death?

A Yes.

Q And as to a third defendant who was not even present at the scene, could you, if you're convinced beyond a reasonable doubt that he was guilty, could you vote to find him guilty?

A If he's guilty. Yes, if he's guilty. Yes.

Q And could you vote for the third defendant who was not even present could be sentenced to be death if you found that that was the appropriate recommendation?

A If he's not even present?

Q If he was not even present, but that he had been proved guilty beyond a reasonable doubt as a principal?

A Oh, yes. Yes.

Q And, again, you don't have any problem with the death penalty as to any one of these three defendants?

A No.

Q Would the fact that the victim was a drug dealer at one time himself and had been convicted of drug charges and then turned informant and witness for the government in drug prosecutions, would the fact of the background of the victim in this case, Mr. Seal, would that make it impossible for you to give the State a fair trial in this case?

A No.

MR. LOTWICK: How about you, Mrs. LeLeux?

MRS. LELEUX: No.

MR. LOTWICK: Would the victim's background affect your outlook on this case at all?

MRS. LELEUX: No.

MR. LOTWICK: All right. Thank you. I tender.

THE COURT: Defense?

MR. MOORE: No questions, Your Honor.

THE COURT: Okay. I'm going to tender Mrs. LeLeux to the State.

MR. LOTWICK: Judge, the State would excuse Mrs. LeLeux.

THE COURT: I'm going to tender Mrs. Charles to the State.

MR. LOTWICK: The State would excuse Mrs. Charles.

THE COURT: Okay. Y'all can go home.

MR. MOORE: Your Honor, we would like to make a contemporaneous objection pursuant to Louisiana Code of Criminal Procedure, Article 795, Subsection "B", the last sentence thereof, regarding the peremptory challenge of prospective Juror 156, Mrs. Charles.

THE COURT: Okay. So noted.

MR. MOORE: The record should reflect that she is a black female.

(Jurors excused.)

THE COURT: Appreciate the hard day's work. See y'all in the morning.

(COURT ADJOURNED.)

VOIR DIRE OF MR. CORMIER
[SR. 7526-7586]

(Jurors McCauley and Cormier brought into courtroom.)

THE COURT: How y'all doing?

MR. MCCAULEY: Fine, sir.

THE COURT: Mr. Cormier, you didn't bring any pizza with you this morning, did you? How long would it take you to go get some?

Okay. Both of you were were present this morning when I read to you the definition of first degree murder in the State of Louisiana?

MR. MCCAULEY: Yes, sir.

(Juror Cormier nods affirmatively.)

THE COURT: And did you understand my discussion that I had concerning the function of the jury, if we reach the penalty phase?

MR. MCCAULEY: Yes, sir.

(Juror Cormier nods affirmatively.)

THE COURT: You understood that the jury, at the conclusion of that penalty phase, would have to return a recommendation to me as to the penalty. Y'all remember that?

MR. MCCAULEY: Yes, sir.

(Juror Cormier nods affirmatively.)

THE COURT: And you understand there are only two permissible penalties, if we get that far in this case.

MR. MCCAULEY: Yes, sir.

THE COURT: My question to you, and we'll start— if we reach that phase, and if you're on the jury, would you have any particular problems in dealing with either penalty?

MR. MCCAULEY: You're talking to me, sir?

THE COURT: Yes, sir.

MR. MCCAULEY: Yes, sir, I believe I would on the death penalty.

THE COURT: What kind of problem would that be Mr. McCauley?

MR. MCCAULEY: I don't feel that I could sentence somebody to death.

* * *

THE COURT: How about you, Mr. Cormier? Would you have any problems?

MR. CORMIER: No.

* * *

THE COURT: Give me a minute to write this down and I'll get started. All right. Mrs. Pulver and Mr. Cormier, do either of you have any interest personally in the outcome of this case?

MR. CORMIER: No.

THE COURT: Mrs. Pulver?

MRS. PULVER: No, sir.

THE COURT: Has anyone communicated with either of you concerning this case? Anybody talk to you in an attempt to try to influence what you would do if you were picked?

MR. CORMIER: No.

THE COURT: Mrs. Pulver?

MRS. PULVER: No, sir.

THE COURT: Okay. Do either of you have any personal knowledge about the case, either from friends, relatives, or from exposure to the news media? Mrs. Pulver?

MRS. PULVER: I probably read something about it and wasn't too interested in it, being that it happened in Baton Rouge, but I'm sure when it happened I read it, but I, you know, don't even remember it. I have been in a conversation where they were telling about Mr. Seal in high school. There's a local doctor who evidently went to school with him, and I didn't talk to him, but someone was saying what he had said. And other than that, I've had no conversations.

THE COURT: How about you, Mr. Cormier?

MR. CORMIER: The only thing I've heard about it is when I got the subpoena, my mother was telling me a little bit about it.

THE COURT: Okay. Now, my question to you is this: Because of whatever it is that you heard or because of

whatever it is that you discussed, or because of whatever it is that you read in the newspaper or heard on T.V. or radio, did y'all form any ideas or conclusions or opinions concerning the facts in this case or concerning the guilt or innocence of these defendants? Mrs. Pulver?

MRS. PULVER: I think anybody who hears, you know, or listens, and I know that the first time that I saw people that are on trial, I had the feeling that they were guilty, and I know that's wrong. Don't misunderstand, I know that I should know that they're not guilty, but I was surprised at the little feeling I had, and I have been afraid that that it might — I don't know how to put it into words.

THE COURT: Okay. We'll talk some more about that.

MRS. PULVER: Okay.

THE COURT: How about you, Mr. Cormier?

MR. CORMIER: No, I have never really had any bias on anything I've felt about it.

THE COURT: Okay. Now, let's get back a little bit now to what you were saying. Do you understand that it is the law that in a criminal case, any case, but particularly a criminal case, the guilt or innocence of a party is decided in a courtroom?

MRS. PULVER: Yes, sir, I understand that.

THE COURT: Based solely and only on the evidence presented in that courtroom. Do y'all both understand that?

MRS. PULVER: Yes, sir.

THE COURT: Mr. Cormier, you have to say it out loud.

MR. CORMIER: Yes.

THE COURT: Do y'all agree with that?

MR. CORMIER: Yes.

MRS. PULVER: Yes, sir.

THE COURT: Do you think that's good?

MR. CORMIER: Yes.

MRS. PULVER: Oh, absolutely.

THE COURT: And do you also understand and realize that whatever you read in the newspaper, or whatever you heard on television, is not evidence? Y'all understand that?

MR. CORMIER: Yes.

MRS. PULVER: Yes, sir.

THE COURT: Okay. Now, we all appreciate that people have feelings. We can't expect people to walk in here with no feelings. You know, we've all walked quite a few miles, we've met quite a few people, we've been exposed to many factors that shape our personality, but what we do require and what we insist upon is that people are able to come in and leave those feelings at the door and sit on that jury and be fair and impartial, listen to the evidence, listen to the arguments, and then listen to the law as I give it to you, because that's my job.

Now, that, we require. We insist upon that. Can y'all do that?

MR. CORMIER: Yes.

THE COURT: Mrs. Pulver?

MRS. PULVER: Yes.

THE COURT: Let me continue a little bit with the law while we're on this point, let me acquaint you a little bit with the law, realizing that at the end of the case my instructions are going to be much more lengthy and in much more detail.

But, under the law, a defendant is presumed to be innocent unless and until the State with competent evidence to your satisfaction proves his guilt beyond a reasonable doubt. Y'all understand that?

MR. CORMIER: Yes.

MRS. PULVER: Yes, sir.

THE COURT: Do you agree with it?

MR. CORMIER: Yes.

(Juror Pulver nods affirmatively.)

THE COURT: You think that's good?

MRS. PULVER: Yes, sir.

MR. CORMIER: Yes.

THE COURT: Now, what does that mean? It means the defendant, and, of course, this is the law, too. It's not only what it means, but this is the law.

A defendant does not have to prove his innocence. You understand that? When the defendant walks in, he is innocent, and he stays innocent, unless the State can satisfy the jury and can carry that burden that I just explained to you. Do y'all understand that?

MRS. PULVER: Yes, sir.

MR. CORMIER: Yes.

THE COURT: Do you agree with it?

MR. CORMIER: Yes.

MRS. PULVER: Yes.

THE COURT: Do you think that's good?

MR. CORMIER: Yes.

MRS. PULVER: Yes.

THE COURT: You see, it's the State that brings the charge, so if they're going to bring the charge, they ought to have to prove it. Isn't that so?

MRS. PULVER: Yes, sir.

MR. CORMIER: Yes.

THE COURT: Okay. Now, because of that, a defendant does not have to do anything. He does not have to

testify if he doesn't wish to, nor does he have to put on any evidence if he doesn't wish to. You understand that?

(Jurors nod affirmatively.)

THE COURT: Do you agree with that?

MR. CORMIER: Yes.

THE COURT: Mrs. Pulver?

MRS. PULVER: Yes, sir.

THE COURT: Do you agree that it is a logical extension of what I have just been talking about?

MRS. PULVER: Yes.

MR. CORMIER: Yes.

THE COURT: All right. So, supposing y'all are on this jury, and supposing we go through this trial, and supposing the defendants, for whatever reason, decide that they're not going to testify, and that's their perfect legal right; supposing that they decide not to put on any evidence, and that's their perfect legal right, would you hold it against them?

MR. CORMIER: No.

THE COURT: You would not hold it against them? How about you, Mrs. Pulver?

MRS. PULVER: No.

THE COURT: You see, this is a court of law. We're not talking about two kids squabbling, and you as a parent,

before you decide what to do about it, you want to hear from both kids, right?

MRS. PULVER: Right.

(Juror Cormier nods affirmatively.)

THE COURT: Well, this isn't the situation here. It's a different set of rules, and it is based on the constitution. So, can you accept that?

(Jurors nod affirmatively.)

THE COURT: Now, if we go through all this, and you, of course, understood and agree with what I just told you, but would you nevertheless somewhere in your makeup still have a little curiosity as to why they don't get up and —

MRS. PULVER: Why, certainly.

THE COURT: Okay. I would imagine that that is a normal human trait; but, it has no place in this courtroom. That's something you'd have to leave at that door when you walk in. Can you do that?

MR. CORMIER: Yes.

(Juror Pulver, no response.)

THE COURT: Can you lay it aside and not permit it in any way, shape, or form to influence you in any manner? Mrs. Pulver?

MRS. PULVER: I don't know.

* * *

THE COURT: But I think I'll proceed. Where was I on the law? Okay. Let me define reasonable doubt, because that gives some people a little problem, and it's really pretty simple.

Reasonable doubt means exactly what it says: a doubt that's reasonable. It's a doubt that you can give a sensible reason for. It is a doubt that is real; a tangible basis, you know, for it must exist. It is not a doubt that's merely imaginary or frivolous, and I think the easiest way to explain it is it's the same kind of doubt that you would permit to influence you in your everyday business affairs.

Y'all understand that?

MR. CORMIER: Yes.

(Juror Pulver nods affirmatively.)

THE COURT: Can y'all accept it?

MR. CORMIER: Yes.

MRS. PULVER: Yes.

THE COURT: All right. A defendant, under the law, the mere fact that he is charged with a crime by a bill of indictment, that doesn't mean anything, nothing. It's just an accusation. It is not evidence and cannot be used as such in any way as to their guilt. Do you understand that?

MRS. PULVER: Yes.

MR. CORMIER: Yes.

THE COURT: Can you guarantee that you will not permit that to influence you in any way whatsoever, if you sit on this jury?

MR. PULVER: I don't think I would.

MR. CORMIER: It wouldn't.

THE COURT: Okay. Now, if you're picked, this is a capital case, the law requires that I sequester the jury. That's a fancy word meaning that I'll put you in the custody of the sheriff. He's going to provide you with lodging, meals, State expense, but no one not on the jury would come into contact with you. There would be no family visits. No telephone calls will be permitted. I'd let y'all watch television but as a group and just only when the news is not on, okay.

Any mail, letters, telegrams, either sent or received, would be censored. Reading materials would be limited to that which doesn't deal with this case or any other criminal case.

Now, my question to you is this: If picked, would service on the jury under those conditions cause you to have an undue hardship? Now, notice I said undue. That means more than ordinary. Mrs. Pulver?

* * *

THE COURT: Mr. Cormier?

MR. CORMIER: Well, the only thing I have is I've cut my foot, and if I got sequestered today, Saturday I do need to get the stitches out. That's the only thing.

THE COURT: Well, I'm sure we could arrange for that. You wouldn't mind if I did it, huh?

MR. CORMIER: No, I wouldn't mind.

THE COURT: Okay. I think I've covered my end of it, so I'll go ahead and tender to the State. Oh, wait a minute. How about lunch? Let's have a good lunch and then we'll come back at 1:30.

(Noon recess.)

[1:30 O'CLOCK. P.M.]

THE COURT: Okay. I think I had tendered to the State.

MS. BURNS: Yes, Your Honor. Good afternoon Mr. Cormier and Mrs. Pulver. What we'll do at this time is to go into a little bit more detail concerning some of the legal issues that may arise, should you be selected for service on this jury.

The first I'll start with is the definition of first degree murder that we allege was violated in this case, and the allegation is that this is a violation of first degree murder which charges a contract killing, or what we call murder for hire, and the definition is as follows:

"First degree murder is the killing of a human being when the offender has specific intent to kill or inflict great bodily harm and has offered, has been offered, has given, or has received anything of value for the killing."

Do each of you follow and accept this definition?

MR. CORMIER: Yes.

MS. BURNS: And you will learn that in Louisiana anything of value is to be given the very broadest interpretation possible. It can mean anything from the slightest conceivable value, a penny, a nickel, a million dollars, and it can also mean other things of value, jewelry, an automobile, drugs.

Can both of you accept and apply this kind of definition?

MR. CORMIER: Yes.

MS. BURNS: The allegation of the State's prosecution is that the victim, Barry Seal, was a convicted felon because at one point in his life he had been involved in drug trafficking, drug smuggling at the very highest international level.

We will allege through witnesses that he then became a government informant and a government witness, and through is aid we will allege that many narcotics prosecutions were made, and that Barry Seal had testified in several federal court proceedings in which convictions were obtained against defendants trafficking in narcotics.

We'll further allege to you that he was scheduled to give similar testimony in court in the future against defendants who were national citizens of Colombia, and because of the fact that he was scheduled to be a witness against these individuals, they put out a contract for money on his life in order that he be silenced and not come into court and testify.

Mr. Cormier, do you understand this is just a theory of the State's case? You understand this is simply what I as a lawyer am telling you. It's not evidence.

MR. CORMIER: Yes.

MS. BURNS: You understand this is a theory? And the same thing, Mrs. Pulver?

MRS. PULVER: I understand.

MS. BURNS: And you will require the State to prove every element of the crime charged beyond a reasonable doubt before you could convict? Mr. Cormier?

MR. CORMIER: Yes.

MS. BURNS: And Mrs. Pulver?

MRS. PULVER: Yes.

MS. BURNS: Knowing that Barry Seal was a convicted felon, will you nevertheless give the State of Louisiana a fair trial, Mrs. Pulver?

MRS. PULVER: I think so.

MS. BURNS: And the same thing to you, Mr. Cormier?

MR. CORMIER: Yes.

MS. BURNS: Now, on the other hand, you may learn through the testimony in this case that one or more of these defendants are illegal aliens; in other words, that they entered the United States illegally, and that the three of them are citizens not of the United States, but citizens of Colombia, a country in South America.

Mrs. Pulver, knowing this fact, will you nevertheless assure us that you'll give each of these three men as fair a trial as you would any citizen of Calcasieu?

MRS. PULVER: That's going to be tough, you know. I have to tell you, that's going to be hard.

* * *

MS. BURNS: All right. You understand that under the constitution an individual who stands charged in the United States, no matter where he's born, whether he's legally or illegally here, still has the same rights as a U.S. citizen? You understand this.

MS. BURNS: So, basically, I guess what I'm asking is: Do you feel that they should not be going through the process of having a trial, or would you hold it against them because they're not American citizens?

MRS. PULVER: I hope I don't hold it against them, but — I hope that I'm not holding it against them, but I don't think I feel the same about it as if they were from our country.

MS. BURNS: All right. And, Mr. Cormier, how do you feel about this?

MR. CORMIER: I believe they deserve a fair case the way any American or any other nationality.

MS. BURNS: All right. So you could — You have no problem with that?

MR. CORMIER: Yes, no problem.

MS. BURNS: All right. In this case we will allege that Barry Seal was machine-gunned to death by one person and one person alone; in other words, there was only one trigger man. Nevertheless, you see that there are two other individuals who stand charged with the same degree of murder as the trigger man, the person we allege to be the trigger man.

This is because of a provision of our law that in some states is called an accessory statute and an aiding-and-abetting statute.

In Louisiana, what we call this is the Law of Principals, and I'm not really sure why the legislature gave it this name, but that's what they call it. And basically the reason behind having a law of principals is that in many cases two or more people will get together, will pool their resources, their talents, their legwork, with the ultimate goal of committing a crime. And during the course of working together, each will perform a separate role, have a separate job and function.

This reads as follows: It states that, "All persons concerned in the commission of a crime, whether present or absent, and whether they directly commit the act constituting the offense, aid and abet in its commission, or directly or indirectly counsel or procure another to commit the crime are principals."

Mrs. Pulver, could you follow this definition?

MRS. PULVER: Yes, I could.

MS. BURNS: And do you understand that as to any degree, if you have the intention to commit the crime, and to do it deliberately, in the words, not by accident, and you are to any degree a principal because you've aided and abetted

in the commission of the crime, whether you are present or absent, as the law states, you may be convicted of the crime.

Do you follow this?

MRS. PULVER: Yes, I do.

MS. BURNS: And, Mr. Cormier, do you follow this?

MR. CORMIER: Yes, I do.

MS. BURNS: An example that I've been giving to potential jurors is say like for example presume that I would like to have someone killed. I don't wish to do the killing myself, but I ask around and I contract out for their services. I offer them $3,000 cash to commit this murder. I give them the name of the victim, I give them a picture of the victim, so they know what he looks like, or she looks like. I give them the victim's address.

And, in addition, I give them my car so that they may be able to have transportation to get to the victim's residence, I give them my gun and tell them, here is the murder weapon.

Now, on the date that the crime is actually committed, on the date that the actual trigger person goes in and pulls the trigger of the weapon that kills the victim, I happen to be taking a vacation in Europe in order to minimize in the eyes of the community my potential involvement in this crime.

Do you understand, Mrs. Pulver, that in this situation I was absent from the scene of the crime, was not even physically present, but because I've procured another person, counselled them, aided and abetted them by giving them the gun and the money, I am just as guilty of the crime charged?

Can you follow me?

MRS. PULVER: Yes.

MS. BURNS: And, Mr. Cormier, do you follow this?

MR. CORMIER: Yes, I do.

MS. BURNS: I will give you three hypothetical situations that we'll work with. The first phase of trial, we've heard the bifurcated trial, which is the legalese, I guess, for a two-phase trial.

The first portion of the trial is what we call the guilt or innocence phase, that portion of the trial that the State is required to produce witnesses, to introduce exhibits, which will convince you and prove guilt beyond any reasonable doubt.

Presuming that the jury returns a verdict of guilty as charged of first degree murder as to one, two, or all three of these men, you then go on to what we call the penalty phase, or the sentencing hearing.

At the sentencing hearing, in order for the jury to be able to consider the recommendation of the death penalty, the requirement is that the State prove beyond any reasonable doubt that at least one aggravating circumstance under the law exists.

What an aggravating circumstance is — there are a list of them in the law books. An example of an aggravating circumstance would be whether a murder was committed during the course of an armed robbery, an aggravated rape, an aggravated kidnapping, crimes that citizens can, I think, generally consider to be the most severe, some of the worse that we have.

An additional aggravating circumstance is whether or not a killing was for hire, as we allege in this case, whether it was a contract murder. A third aggravating circumstance would be whether or not the defendant or defendants foreseeably created a risk of death or great bodily harm to more than one individual; in other words, in a situation where a person might put a bomb in a building, intending to kill only one person but in the process of doing so, creating a great risk to more than one person.

These are what the law calls aggravating circumstances. It is not the complete list, but in order for you to even be able to consider recommendation of the death penalty, you must find that at least one of these — And you may find after the close of the evidence in this case that more than one exists. You must find the existence at one beyond a reasonable doubt, and then you must go on to consider what we call mitigating circumstances.

These are circumstances that mitigate or lessen in favor of the sentence of life imprisonment. Some mitigating circumstances that the law recognizes is the youth of a person at the time of the commission of the crime, the lack of a prior criminal history, whether or not the person was mentally disturbed, under emotional distress, under the influence of drugs or alcohol, things of this nature.

But there's a catchall that anything and everything that could possibly be considered as a relevant mitigating factor may be considered by the jury.

After you consider both aggravation and mitigation, you must be unanimous in your recommendation in order for the death penalty to be recommended back to the Court. If the recommendation is less than unanimous, automatically the Judge must impose the lesser life sentence in this case.

Mrs. Pulver, do you basically follow the procedure that we use?

MRS. PULVER: (Nods affirmatively.)

MS. BURNS: Mr. Cormier?

MR. CORMIER: Yes.

HODGES W. CORMIER. JR. previously sworn

BY MS. BURNS:

Q Mr. Cormier, I'll start with you. Presume that we're at the first phase of trial, which is the guilt or innocence phase. If after hearing all the evidence you are convinced beyond any reasonable doubt that the trigger man is guilty, could you vote to find him guilty as charged?

A Yes, I could.

Q And going on to the sentencing hearing, as to that trigger man, if after hearing everything in aggravation and mitigation you are convinced that life is proper as to the trigger man, could you vote for the life sentence?

A Yes, I could.

Q On the other hand, if you should find from the circumstances that the crime is so aggravated that the death penalty would be your recommendation, could you vote for death as to the trigger man?

A Yes, I could.

Q Going on back to the first guilt or innocence phase of trial, if at the close of all the evidence you find that there was a second person physically present at the scene of the crime with the trigger man — Now, this would be a person who did not actually pull the trigger, but who nevertheless, under the definition that I read to you, aided and abetted and was concerned in the commission of the crime, and this has been proven beyond a reasonable doubt, could you apply the law of principles and convict this person of murder?

A Yes.

Q And going on to his sentence. If after hearing everything in aggravation and mitigation you're convinced that life is your recommendation, could you vote for the life sentence?

A Yes.

Q On the other hand, if you find the facts are so aggravated that your recommendation would be for the death penalty, could you vote for the death penalty as to this second individual?

A If it was so aggravated, yes.

Q And you can keep an open mind as to both sets of circumstances, and you may — right now you may think automatically the trigger is worse than the others. You may, at the close of the evidence, have a different opinion. Do you understand what I'm saying?

A Uh-huh. (yes)

Q If you should find that there was a third person not present at the scene of the homicide itself; in other words, under the definition of law that I read to you, all persons concerned in the commission of a crime, present and absent, and considering the example I gave you of where I'm in Europe on the date that I ordered this killing, if you find that although this person was not present at the crime scene, that he nevertheless aided and abetted and was concerned in this crime beyond any reasonable doubt, could you follow the law and convict him?

A Yes.

Q And considering both penalties, could you return, if proper, the life sentence in this case?

A Yes.

Q And if appropriate and so aggravated, if death were your recommendation, could you vote for the death penalty as to this person?

A Yes.

MS. BURNS: Could you pass the mike to Mrs. Pulver?

MRS. KENNETH N. PULVER previously sworn

BY MS. BURNS:

* * *

MS. BURNS: All right. And you understand that many of the things that you use in just judging what we call the believability of a witness are gut feelings that you, that I,

that Mr. Cormier use every day in our life, things when we're talking to relatives, people we love, people we know, things that we use when we talk to strangers.

It's a lot that's just a gut feeling. You look at a person, you talk to him, you kind of size them up, you know, you have an opportunity to see them, and then you can look to other things, whether or not that person is backed up by other people, other, not evidence, but other things that you might look to and find?

And these are just things, common sense, good judgment, reason, and these are things we ask you certainly not to leave outside the door of this courtroom just because you're seated as a juror. We ask you to apply your common sense and good reason when you judge the facts of this case and when you judge the believability of the witness.

Can you do this, Mrs. Pulver?

MRS. PULVER: I think so.

MS. BURNS: And, Mr. Cormier, can you do this as well?

MR. CORMIER: Yes, I can.

MS. BURNS: We'll present to you what we call both direct and circumstantial evidence. Direct evidence is the evidence of an eyewitness to a crime. For example, if you left here at lunch, saw somebody get shot in the street, and if you were called into court to testify as an eyewitness, that would be in the form of direct evidence.

Circumstantial evidence is evidence such as the testimony — the analysis of fingerprints, handwriting, blood, ballistics, things of this nature.

Mr. Cormier, can you accept and apply both types of evidence, provided the State proves guilt beyond all reasonable doubt?

MR. CORMIER: Yes, I can.

MS. BURNS: And, Mrs. Puler, the same guestion to you?

MRS. PULVER: Yes.

MS. BURNS: Thank you. The State will tender.

MR. MOORE: Good afternoon.

MRS. PULVER: Hello.

MR. MOORE: I think I've already introduced myself to you, Mrs. Pulver, my name is Moore.

Mr. Cormier, how do you do?

MR. CORMIER: All right.

MR. MOORE: I am a defense attorney in this case, and myself along with Mr. Sharpstein and Mr. Walker will be representing the defendants in this case.

Now, you understand that there are three people on trial here, and yet there's only one trial. The law permits more than one person to be tried together, but at the same time, each defendant is entitled to have his case judged individually so that even though they're being tried together, it's not the kind of situation where one person is found guilty the other two must be.

Each defendant is entitled to have the facts and circumstances weighed individually as it pertains to him. And if the juror finds, for example, that the State has not been able to prove their case against a particular defendant, they should find that defendant not guilty.

Do you have any trouble with that, Mrs. Pulver?

MR. PULVER: No. In other words, one could be guilty and maybe two not guilty?

MR. MOORE: Oh, absolutely, or three not guilty, or three guilty, or two guilty and one not guilty; any possible series of combinations is permitted.

MRS. PULVER: Okay.

MR. MOORE: Because the guilt of one defendant doesn't depend upon the guilt or innocence of another. Each defendant is entitled to have his case considered separately and individually. You understand?

MRS. PULVER: Even though they're tried together?

MR. MOORE: Yes, ma'am.

MRS. PULVER: Okay.

MR. MOORE: That's right. Do you have any problem with that, Mr. Cormier?

MR. CORMIER: No, I don't.

MR. MOORE: So you understand that this is not a case where the government or the prosecution is going to be coming to you and asking you to judge guilty by association, because there's no question of that in a courtroom.

Have you ever heard of a saying, "you're judged by the company that you keep"? Have you ever heard that, Mr. Cormier?

MR. CORMIER: Yes.

MR. MOORE: Now you understand in a courtroom, just because if the State can only prove that you've been hanging around with a bad group of people, and that's all, you can't be convicted of a crime for that unless you yourself did something with the intent for that crime to occur. You understand?

MR. CORMIER: Yes.

MR. MOORE: Do you, ma'am?

MRS. PULVER: Yes, I do.

MRS. KENNETH N. PULVER

EXAMINATION BY MR. MOORE:

* * *

based upon this colloquy, I believe the prosecution will join with us in a request that the juror [Pulver] be excused for cause.

MS. BURNS: We've got no problem with that, Your Honor.

THE COURT: Okay. The challenge is maintained.

MS. BURNS: At this time, Your Honor, the State would go ahead and will, in the interest of saving time, peremptorily excuse Mr. Cormier.

THE COURT: Okay. Y'all have both been excused. Y'all may go home.

(Jurors Pulver and Cormier excused.)

MR. MOORE: Your Honor, pursuant to the provisions —

THE COURT: Let me write this down, please, sir.

MR. MOORE: Your Honor, if I might for the record enter an objection pursuant to the provisions of Code of Criminal Procedure Article 795, Subsection "B", the last sentence thereof, on the grounds that Mr. Cormier, Juror 261, a black male, was excused, and we feel that it violates the provisions of the law that I've indicated.

Incidentally, I would like the record to reflect that yesterday Mr. Hawkins likewise was excused peremptorily. He was a black male, and we would like the record to reflect our objection pursuant to Code of Criminal Procedure 795, Subsection "B", the last sentence thereof.

THE COURT: So noted.

MR. BURNS: The State would like to object to the fact that Mr. Hawkins' objection was not contemporaneous within in the meaning of *State versus Eric Brown*, and I'd ask that that be noted as well, Your Honor. It was not contemporaneously made yesterday.